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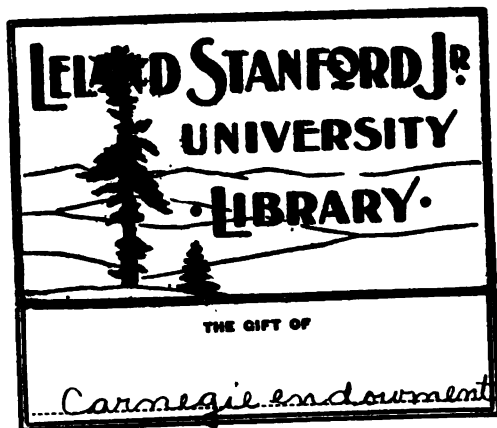
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# INTERNATIONAL LAW CODIFIED

AND

## ITS LEGAL SANCTION

OR

### THE LEGAL ORGANIZATION OF THE SOCIETY OF STATES

*Le Droit sera un jour le souverain du Monde*

MIRABEAU

BY

PASQUALE FIORE

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OF NAPLES; SENATOR OF ITALY; MEMBER OF THE  
INSTITUTE OF INTERNATIONAL LAW

TRANSLATION FROM THE FIFTH ITALIAN EDITION  
WITH AN INTRODUCTION

BY

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YVASSLJ OROFNATZ

## PREFACE

The translator's admiration for his friend, Pasquale Fiore, made him the more eager to pay a just tribute to a constructive scholar of international renown by accepting the invitation of the Division of International Law of the Carnegie Endowment to introduce to the English-speaking public Fiore's "International Law Codified." The Carnegie Endowment, in offering the book to the American public is carrying out its plan of widening the horizon of American students in the field of international law, as is already being done with marked success by the Institute of Criminal Law and the Association of American Law Schools in the fields of criminology, philosophy of law and legal history.

The book does not purport to be a code of existing international law, but rather a systematic body of rules evolved by the author out of his accurate knowledge of positive law and of the defects of the prevailing system and submitted for adoption to the nations of the world for the better legal regulation of their mutual interests and relations. In this day of reorganization of the international order, Fiore's proposals for reform cannot but meet with attentive consideration, and the scientific and practical training of the author must lend weight to his recommendations. The book, begun in the author's fiftieth year, embodies the fruits of long thought upon and extensive experience with the problems with which it deals. The principal reforms suggested by the author are more specifically set forth in the Introduction.

E. M. B.

New Haven, Conn.

September 1, 1917.



## INTRODUCTION

International law, in so far as it relates to the rules governing war, is to-day undergoing the same experience it has had many times in the last two hundred years. Each of the great conflicts in the history of international relations has threatened with destruction the most sacred institutions of the law of nations; yet, notwithstanding, the progress of civilization has witnessed the tissue of that law emerge from each crisis tougher and firmer.

The Thirty Years' War, the Wars of Louis XIV, the many continental wars of the eighteenth century (particularly those of its last two decades), the Napoleonic struggles, have each been followed by an era of law-making designed to establish a more orderly regulation of international relations. The necessity for greater order and the strengthening of international law has been emphasized in the last half-century, when the remarkable development of commerce and industry, with the realization of the interdependence of nations, led to several international conferences terminating with those of The Hague, whose activities seemed to bring very near the day of the international legislature. In troublous times like the present, it is not sufficiently recalled that although international relations in time of peace have grown continually more complex, the rules governing those relations are commonly observed and judicially enforced. Moreover, the vast growth in arbitration during the last century affords unmistakable evidence of the toughening fibre of the law and its processes. Even the laws governing war are not without their sanction, as was shown in the Russo-Japanese war. Only when a majority of the Great Powers, impelled by the exigencies of the moment and their physical ability to depart from its recognized precepts, undertake to violate international law—fortunately only an infrequent occurrence—does the weakness of the system afford ground for complaint and manifest the necessity for improvement. Its defects consist, therefore, not in the absence of commonly recognized rules

to govern the situations usually arising, nor even in their general non-observance; but rather in the physical inability—under the present international organization—to enforce its sanctions when the Great Powers simultaneously disregard its provisions, and in the lack of a sufficiently strong legal organization of the nations of the world to compel joint action if the rules are violated by any member of the society of nations. This end, to bring about the reign of law among nations and to establish a legal organization among them, with agencies and instrumentalities capable of enforcing the rules of law, has been the aim of numerous thinkers and publicists, among the foremost of whom is the great Italian jurist, Pasquale Fiore.

Fiore, the leading Italian authority on public international law, was born April 8, 1837, and devoted a long and useful life to the study and development of international law—as a jurist, teacher, writer, Senator of Italy and legal adviser to the Italian government. With the usual preparation in law, theology, and philosophy—which subject he taught for two years at Cremona—he entered in 1863 upon his career in the science with which he will always be identified, by accepting an appointment as professor of international law at the University of Urbino. In 1865 he was called by the University of Pisa; thence in 1876, he went to Turin and in 1882 to Naples, where he occupied the chair of international law—and for some time that of comparative law—until the time of his death, December 17, 1914.

In 1865, while professor at Pisa, he published the first edition of his well-known work *Diritto internazionale pubblico*, the first systematic modern treatise on international law published in Italy. As a disciple of the great Italian jurist, Mancini, the father of the school and doctrine of nationality, Fiore published in 1869 his *Diritto internazionale privato*. Both works were marked by originality and an objective scientific point of view then rare among writers on international law. His active participation as consulting counsel in numerous cases and his unremitting labors in the constructive work of the Institute of International Law progressively added to the scientific and practical merits of his treatise on public international law as, with the years, new editions were issued, both in Italian and in foreign languages.

Fiore's aspirations for the legal organization of the society of

nations and the safeguarding of international law by joint action may be traced to the Wolfian doctrines of the *magna civitas* and the Ciceronean principles of the universality of law. They were fortified by his training in philosophy and in civil law, by his many years of study of comparative law, by his legal activities as private counsel and adviser of his Government, and finally by his profound knowledge of history and of international law. With this equipment, fortified by experience, he began, in his fiftieth year, the preparation of the constructive work herewith presented to the English-speaking world under the title "International Law Codified."

In this work, which was first published in 1890 under the title *Il diritto internazionale e la sua sanzione giuridica*, Fiore has synthesized the fruits of his many years of study and experience by setting forth a plan of international organization with the rules of law to govern the relations between states. His work is not a code of existing international law, like that of Bluntschli and of Field, but a proposed body of rules which should govern states in their mutual relations, *de lege ferenda*. His unusual equipment and authority give weight to his recommendations. His proposals are founded in part upon positive law, in part upon the accumulated labors of the Institute of International Law in the reform of international law, in which Fiore took so prominent a share, and in part upon his own solutions for the existing defects in the law of nations which matured thought and experience had dictated. It was a matter of justifiable pride with him that the Hague Conferences had transformed into legislation so many of the rules he had advocated and so many of the proposals arising out of the collective scientific labor of conferences in which he had participated. His ideal of the *magna civitas* and the universalization of international law seemed to him to approach realization with the successful meetings of the Hague Conferences. Yet he expressly rejected the implication that all his proposals could be immediately translated into positive law, a reservation which the present crisis in international relations has justified.

Throughout his work he has endeavored to find a feasible remedy for the recognized defects of the existing system—the divergent doctrines in certain particulars of the two principal schools of international law, the Anglo-American and the continental, es-

pecially in their views as to the relation of international law to municipal law; the absence of any recognized method to change a rule of international law or to repeal an antiquated or obsolete rule, inapplicable to changed conditions; the absence of any method to interpret uniformly an obscure or ambiguous rule of law; the want of any machinery to compel nations to submit their disputes to arbitration; and the lack of any substitute for force and war in effecting political changes, a phenomenon which history has shown to be inevitable.

To meet these admitted defects of the existing order he has proposed (1) the periodical meeting of a Congress which shall have the power to legislate for the *magna civitas* and provide means for the enforcement of the rules of law established, by authorizing collective action by states; and (2) the convening of a Conference, which shall, on the request of any state, settle political controversies, interpret ambiguous rules of law, and insure the execution of rulings of the Congress by referring the case to arbitration or to the Congress for executive action. His proposals for the pacific settlement of international disputes have already been fully adopted and probably his proposal for compulsory arbitration of certain types of differences will some day find universal recognition.

Among the numerous reforms and progressive doctrines which Fiore advocated, several will command the attention of statesmen and thinkers:

He contends that every individual has international rights as a human being—apart from his rights as a citizen of a particular state—which must be universally respected. These “international rights of man” include the unrestricted freedom of migration and the freedom of expatriation without the state’s consent. He would place limitations upon the arbitrary power of the State; thus, he denies the State’s right to exclude foreigners or to prohibit them from acquiring real property.

In the elaboration of his plan for the institution of the Congress, the Conference, and the Court of Arbitration, it is interesting to observe his deference to public opinion as the controlling agency in the shaping of foreign policy. He is an ardent champion of the democratization of foreign policy; and his denunciation of the evils of secret diplomacy, with the result that whole peoples are bound to treaties and alliances without their knowledge or con-



sent, lend authoritative support to the principles of the Union for Democratic Control in England.

Fiore believed firmly in the principle that international law could at no period be permanent and definitive, but that it changed and grew with the times. He was, therefore, of the opinion that the Congress should not be a permanent legislature, but should meet only at periodic intervals or as exigencies required. He believed that the people should be specially represented in the Congress, because they have international rights distinct from those appertaining to the State, and the force of public opinion he would especially respect. But he would confine the right to vote only to the well-informed classes.

He was opposed to any permanent confederation of states where the Great Powers prevailed, and he decried any combination to maintain the *status quo*, such as Rousseau's Project of Perpetual Peace, in which some may find a prototype for the proposed League to Enforce Peace. He considered arbitration as inadequate, as most of the complex questions which disturb the peace of nations cannot be submitted to arbitration. To deal with these questions, he would call the Conference of states, a quasi-judicial body vested with power to adjust political differences, and an instrument designed to take the place of force in the settlement of international problems. It is not at all improbable that the world possesses or can develop statesmen of sufficient breadth and vision to accommodate the political equilibrium to the economic and social virility of peoples, and thus replace the present artificial system by which conflicting ambitions without regard to larger social necessities ultimately lead to destructive clashes.

In the new edition from which the present translation has been made Fiore has substituted for the term "natural law" the term "rational law," which he regards as the law of reason and as a residuary source from which positive law is derived.

It is Fiore's view and one which already has many earnest adherents, that whenever a state violates a rule of international law in its relations with another state, the immediate damage arising from the wrongful act not only violates the right of the injured state but also that of all the states jointly and severally interested in the legal organization of the society of states. Hence he posits the doctrine that all the measures and institutions designed to

assure the authority of international law must be considered within the collective protection of all the states which established them. He strongly supports collective intervention in behalf of the rights of humanity.

He manifests excellent understanding of the true purport of the Monroe doctrine by denying its efficacy to prevent European nations from prosecuting the diplomatic claims of their citizens against Latin-American states and, if necessary, undertaking collective interposition to effect that purpose. He rejects the exaggerated views of its meaning which prevail throughout the world and, not least of all, in the United States. Moreover, in the matter of international claims, he considers that no state should deny a claimant the right to bring suit against it, if an adjustment cannot be made diplomatically. While he suggests no method of procedure, others have advocated an International Court of Claims.

In the chapter on the American Institute of International Law, one of the two new chapters added to the previous editions of the work, Fiore makes the fruitful suggestion that the so-called American international law is really interstate law in the particular fields in which it is applied, as distinguished from international law. This view has been adopted by von Liszt; and Alejandro Alvarez, the learned Chilean publicist, has developed the idea into several different divisions of international law—continental, interstate, schools of international law, etc.

Not the least valuable contributions of Fiore's work are his criticism of existing institutions of positive law and his suggestions for reform. For example, in the matter of extradition, he is opposed to the principle of Italian law and that of other states, often incorporated in treaties, by which the State refuses to deliver up its own citizens on a demand for their extradition. Among questions arising out of war, he condemns severely the assumed right of belligerents to determine for themselves without restriction the list of articles they will consider contraband of war.

The present work reached its fourth edition in Italy in 1911. The revision of that edition for the present English version was the last scientific work of its distinguished author. Although the present edition takes almost no account of the legal problems arising out of the European War, the work of reconstruction which must follow the crisis through which we are now passing will find

a fruitful source of inspiration in the thoughtful contributions of Pasquale Fiore.

The literary fruits of his prolific mind are represented in the appended list of his publications, as drawn up by Professor Catellani:

#### WORKS OF PASQUALE FIORE

- Elementi di diritto costituzionale e amministrativo.** Cremona, 1862.
- Nuovo diritto internazionale pubblico.** Milano, 1865. Second edition entitled *Trattato di diritto internazionale pubblico*, 3 v., Torino, Unione tip. editrice, 1879-1884. Third edition, *ibid.*, 1887-89. Fourth edition, *ibid.*, 1904-06. The first edition was translated into French by Pradier-Fodéré under the title, *Nouveau droit international public*, 2 v., Paris, Durand et Pedone Lauriel, 1869; and the following edition into French by Ch. Antoine (*Traité de droit international public*, Paris, Durand et Pedone Lauriel, 1885-86) and into Spanish by A. Garcia Moreno (*Tratado de derecho internacional publico*, Madrid, F. Gongora, 1879-85, in 3 volumes and in 1894-95 in 4 volumes).
- Diritto internazionale privato,** Firenze, Le Monnier, 1869. Second reprint edition, 1874. Third edition, entirely revised, Torino, Unione tip. ed., 1888-1891, in four volumes. Fourth edition, *ibid.*, 1902-1909. The first edition was translated into French and annotated by Pradier-Fodéré (*Droit international privé, trad. de l'italien, annoté, etc.*, Paris, Durand et Pedone Lauriel, 1875); into Spanish, by Garcia Moreno (*Derecho internacional privado*, Madrid, F. Gongora, 1878, 2 v.); the third into French by Ch. Antoine, 4 v., Paris, Pedone Lauriel, 1890-91, and into Spanish by Garcia Moreno, 4 v., Madrid, Gongora, 1888-91.
- Del fallimento secondo il diritto internazionale privato.** Pisa, Nistri, 1873.
- Effetti internazionali delle sentenze e degli atti in materia civile.** Pisa, Nistri, 1875.
- Della giurisdizione penale relativamente ai reati commessi all'estero.** Pisa, Nistri, 1875.
- Degli effetti extraterritoriali delle sentenze penali: della estradizione.** Pisa, Nistri, 1877. Translated into French by Ch. Antoine (*Traité de droit pénal international et de l'extradition*, Paris, Pedone Lauriel, 1880, 2 v.) and into Spanish under the direction of the "Revista general de legislación y jurisprudencia" (*Tratado de derecho penal internacional*, Madrid, 1880). Of this work and the one preceding on civil judgments, a Spanish version was published by Garcia Moreno (*Efectos internacionales de las sentencias de los tribunales*, Madrid, Gongora, 1888).
- Sul problema internazionale della società giuridica degli stati.** Torino, Stamperia reale, 1878.
- Delle aggregazioni legittime secondo il diritto internazionale.** Torino, Stamperia reale, 1879.
- La nave mercantile nei suoi rapporti col diritto internazionale.** In "La Legge" 1882, II, col. 317.
- Les lois réelles et les lois personnelles d'après les principes du droit international et la jurisprudence.** In "France judiciaire," 1882, p. 117.
- Consideraciones sobre el movimiento jurídico internacional moderno.** In "Revista general de legislación y jurisprudencia." Madrid, 1882, p. 338.

- De la protection des marques de fabrique et de commerce d'après le droit international positif. In "Journal du droit international privé," vol. IX, 1882, p. 50.
- Agenti diplomatici. In the "Digesto italiano," vol. II, Parte 1<sup>a</sup>.
- Adozione. In the "Digesto italiano," vol. II, Parte 1<sup>a</sup>.
- Delle disposizioni generali sulla pubblicazione, applicazione ed interpretazione delle leggi. In the "Diritto civile italiano secondo la dottrina e la giurisprudenza esposto dai proff. ecc.," edited by P. Fiore, Napoli, Marghieri, vol. I, 1886, vol. II, 1887. Second edition, Napoli, Marghieri, 1906-09.
- Del matrimonio degli stranieri nel regno: osservazioni sull'art. 102 cod. civ. confrontato con l'art. 6 disp. prelim. In "Diritto e giurisprudenza," vol. 1, 1886, p. 447.
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- Considerazioni sull'art. 10 disp. gener. del cod. civ. per quello che concerne le sentenze straniere. In "Diritto e giurisprudenza," vol. 2, 1887, p. 301.
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- Degli atti dello stato civile formati in paese straniero. In "Diritto e giurisprudenza," vol. IV, 1889, p. 253.
- Elementi di diritto internazionale privato. Manuale ad uso degli istituti superiori. Torino, Unione tip. ed., 1889.
- De la possession en droit international privé. In "France judiciaire," 1889.
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- Considerazioni intorno al diritto spettante al coniuge divorziato di celebrar nuove nozze. In "Legge," 1889, I, col. 534 and 786.
- Il diritto internazionale codificato e la sua sanzione giuridica. Torino, Unione tip. ed., 1889-90. Second edition, *ibid.*, 1898. Third reprint edition, 1900. Fourth, revised and enlarged edition, Torino, Unione tip. ed., 1909. Fifth enlarged, *ibid.*, 1915. French translation of the first edition by A. Chrétien (*Le droit international codifié*, Paris, Chevalier, Marescq, 1889), and of the fourth edition by Ch. Antoine (*Le droit international codifié et sa sanction juridique*, Paris, Pedone, 1911). Spanish translation by Garcia Moreno (*El derecho internacional codificado*, Madrid, Gongora, 1891). Revised and enlarged edition, translated under the direction of the "Revista general de legislacion y jurisprudencia" (third ed., Madrid, De Reus, 1911); English translation, from the fifth Italian edition, by Edwin M. Borchard. (Washington, Carnegie Endowment for International Peace, 1917.)
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- Sentenze straniere ed atti. In "Digesto italiano," vol. XXI, pt. 2.
- Dello stato e della condizione giuridica delle persone secondo la legge civile. Napoli, Marghieri, 1893. In "Diritto civile italiano secondo la dottrina, etc." Second edition, entitled "Della cittadinanza; del matrimonio." Napoli, Marghieri, 1909.
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- Il riordinamento degli studi superiori. Napoli, Schipani, 1894.
- Della personalità giuridica dei corpi morali e della personalità giuridica dello Stato all'interno e all'estero. In "Giurisprudenza italiana," 1894, IV col. 219. Published also in the "Revue générale de droit international public," vol. 1, 1894; in the "Zeitschrift für internationale Privat- und Strafrecht," vol. IV-V, 1894-95; and in the "Revista general de legislacion y jurisprudencia," 1895.
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# INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION

## CHAPTER I

### *AUTHOR'S INTRODUCTION*

#### GENERAL SURVEY OF THE ORGANIZATION OF THE INTERNATIONAL SOCIETY

1. Historical view of the conception of a community of law among the different nations. 2. Present condition of the society of states. 3. Need of providing it with a more rational form of organization and of creating a sanction for the law which ought to govern it. 4. Imperfection of the different projects conceived. 5. Proposal of arbitration as a means of ending armed peace. 6. Insufficiency of the proposal: Note of the Czar of August 12/24, 1898. 7. The First Peace Conference of July 29, 1899. 8. The Second Conference assembled on the invitation of the Emperor of Russia on July 15, 1907. 9. Solution of the problem of providing the society of nations with a legal organization.

1. The great problem of the present day requiring early solution is to provide for a more rational organization of international society. Indeed, the present condition of that society is obviously imperfect. Notwithstanding their arduous labors, publicists have failed to agree upon the principles by which international society should be governed. Governments have, it is true, admitted certain rules which have been given the authority of "common" law; but those of such rules which have a sound basis constitute only a minor part of the domain of international law.

The greatest difficulty in this respect consists in insuring recognition for established rules. In civil society, social activity, liberty and actions are not only prescribed and regulated by laws and codes, but courts and well established legal methods of coercion exist to prevent and punish the violation of law.

In international society, on the contrary, no superior authority is invested with the power of preventing this or that state from abusing its power to violate the right of others, nor is there any

legal institution generally recognized to settle the difficulties arising out of the abuses of liberty. Every state must insure the defence of its rights, and when wronged, has no other means of redress than recourse to reprisals, and as a last resort, the employment of armed force.

Now, considering these obvious imperfections of international law, might we not consider as valueless the intellectual and political movement of our time aiming at the organization of international society?

Why is it that, notwithstanding the time elapsed, and long and serious effort, the problem is still so far from solution? What has been done up to this time to insure its solution? And is this solution now near at hand? What may we hope of the present? What must be done to attain the end desired in the future?

All these questions are extremely complex. To examine the matter thoroughly, it would be necessary to study the past as well as the present; to consult both public history and the secret history of diplomacy; to inquire into the hidden motives of many events; to set forth the causes which, both in the past and in the present, have constituted an obstacle to the establishment—if not among all the states, at least among all the civilized countries—of a real community of law, so as to endow the international society with a genuine legal organization.

To study the question thoroughly would require the writing of several volumes; but it is our intention to confine ourselves to a rapid survey, presenting only a general and summary idea of the subject.

In the first place, let us remember that if so little progress has been made towards the solution of the problem, it is because the problem has but recently been presented. Furthermore, a legal community among the states was an idle dream so long as the true idea of such a community had not been conceived. To this, there were many obstacles. First, there was the obstructing tendency of each nation to live apart and to foster sentiments of distrust against foreigners, whence originated the erroneous idea of restricting the community to the people belonging to one nation only. Such was the case in Greece.<sup>1</sup>

<sup>1</sup> Pastoret, *Histoire de la législation*, v. V, 5 and 372-73; Montesquieu, *Esprit des lois*, xxi, 7; Herodotus, lib. vii, § 133.

The community of language, of artistic and scientific genius, of religion and of customs among the different Greek cities led to the formation of a bond amongst them, but not between them and foreigners. The Greeks considered as barbarians the nations which did not belong to Greece. The philosophers favored these exclusive tendencies. Plato, indeed, considered the human race as divided into Greeks and barbarians; and Aristotle proclaimed that all other nations were barbarians predestined by nature to be subjected to the Greeks.

Another obstacle was the professed superiority of certain races, a superiority founded on religious beliefs. Such was the case with the theocratic states, which considered as beyond the pale of "common" law all the peoples who did not share their beliefs. The immoderate passion for conquest also constituted an obstacle. Thus, the policy of the Romans in their relations with other nations was inspired by a boundless desire to subdue them and to bring to fruition the proud project of making of all countries colonies of the Empire.<sup>1</sup>

Christ, by proclaiming the unity of mankind and the fraternity of all peoples, gave the true conception of humanity: "There are neither Hebrews, nor Greeks, nor slaves, nor free men, since you are all brothers in Jesus-Christ."<sup>2</sup> This conception is broader and more complete than those advocated by all the philosophies. Tertulian said in effect that the world should form one single republic: "I know," said he, "but one republic—the world."<sup>3</sup> This doctrine would certainly have inaugurated the idea of community amongst all the peoples of the universe; but a new obstacle contributed to retard that splendid end.

The most serious mistake of the Papacy was to assume that it was the sole and exclusive repository of truth, and that every one, voluntarily or by force, had to be brought to the faith.

To Saint Thomas, who asked of Him how to find his way,

<sup>1</sup> Ortolan, *Histoire de la législation romaine (Politique extérieure de Rome)*; Laurent, *Histoire du droit des gens*, v. 3; Osenbrueggen, *De jure belli et pacis Romanæ*.

<sup>2</sup> *Non est Judæus neque Græcus; non est servus nec liber; non est masculus neque femina. Omnes enim vos unum estis in Christo Jesu (Epist. Pauli ad Galatos, 3-28).* See also *In Romanos*, III, 28-29; *Coloss.*, III, II. Compare Laurent, *Hist.*, v. 4.

<sup>3</sup> *Unum omnium rempublicam agnoscimus, mundum.* Apolog. 39.

Jesus-Christ answered: "I am the truth and the life; no one can go to the Father except through Me."

As vicar of Christ, the Pope believed that he alone was in possession of the truth and proclaimed that all those who did not follow his doctrine were lost. This resulted in intolerance and persecution to suppress heresy, and in the mistaken idea that it was an act of charity to combat the adversaries of the doctrine of the Papacy.<sup>1</sup>

So it happened that a new form of dualism was created between the orthodox Christians and the heretics. Just as the Greeks considered foreigners as barbarians outside the "common" law, so the Papacy considered as excluded from that law the peoples who did not follow its doctrine.

The Catholic Princes were urged by the Pope to resort to arms for the defense of the faith, and the most cruel wars against heretics and infidels were undertaken in the name of the religion of Christ, a religion of peace and love.<sup>2</sup>

This was the sanguinary period of the religious wars. The horrible war of the Albigenses, the Crusades, the relentless struggles against the Protestants were directly due to the doctrine of the Papacy.

A reaction, however, was not long in coming. A struggle began for the separation of the public law of the State from the public law of the Church, for the vindication of the essential attribute of human personality, the right to freedom of conscience, and for the freedom and equality of the three churches, Catholic, Lutheran and Calvinist.

The Reformation finally triumphed and the victories it had gained were recognized in the treaty of Westphalia, which consecrated a principle of community among peoples professing different religious beliefs.<sup>3</sup>

<sup>1</sup> Saint Augustine, Epist. 185, *De correctione Donatistarum*, n° 13; he expresses himself as follows in Chapter XXIII: *An non pertinet ad diligentiam pastorem, etiam illas oves, quæ non violenter eruptæ sed blande leniterque seductæ, a grege aberraverint, et ab alienis cooperint possideri inventas ad ovile dominicum, si resistere voluerint, flagellorum terroribus, vel etiam doloribus revocare? Sic enim error corrigendus est ovis, ut non in ea corrumpatur signaculum Redemptoris.* Compare Saint Bernard, *In cantica*, sermo 66, n° 12; Baronius, *Ann.*, anno 385, v. IV; Barbeyrac, *Traité de la morale des Pères*; Saint John Chrisostome, *Homelia in Psalm. 43, Alieni filii qui sunt*, B.

<sup>2</sup> See Robertson, *History of America*.

<sup>3</sup> See on the influence of Richelieu, Monteil, *Histoire des Français*, v. VII,



Nevertheless, the struggle assumed a new form by reason of the erroneous conception of the basis of the true community and of rational principles designed to protect it.

We shall not enter into the details of this question, as it would be necessary for us to follow the winding road which nations have had to travel under the pressure of circumstances and of false notions concerning the foundation of political greatness and economic prosperity. We would have to bring to light the secret history of politics and diplomacy of the different countries and expose the errors of the system known as "Colbertism," a system which perverted the mission of the State, the basis of commercial relations and the bond of relationship between the different countries of the world.

It was believed that, in order to preserve the independence of states, it was indispensable to prevent the renewal of the danger of universal monarchy, and consequently to maintain among the states a certain balance of power to render impossible the preponderance of any one of them.

Frederick the Great, assuming the rôle of interpreter of the general convictions of his time, wrote in his *Anti-Machiavelli* that the peace of Europe was based largely upon the maintenance of that well conceived equilibrium by which the superior strength of one monarchy was counterbalanced by the combined power of several other sovereigns.<sup>1</sup>

How many events have there been, how many conflicts, how many alliances contracted and broken, how many treaties signed and violated, whose purpose was to prevent the preponderance of this or that country, always designed to assure the European equilibrium and the well known balance of power!

When France, at the time of Henry IV, and in greater degree during the reign of Louis XIV, became powerful and feared, the other states allied themselves against her in order to weaken her. France, which had dictated the conditions of peace in the treaty of Nimègue of 1678 and in the treaty of Ryswick of 1697, had to submit in 1713 to the conditions which the allied Powers imposed on her and sign the treaty of Utrecht, by which she renounced her

p. 114; Champion, *Mémoires; Mémoires du Cardinal de Retz; Le-Vassor, Histoire de Louis XIII*, v. X; Caussin, *Mémoires de Richelieu*.

<sup>1</sup> *Anti-Machiavelli*, Part 3, chap. XXVI, p. 58.

projects of aggrandizement. Other wars were also undertaken to maintain the equilibrium, notably the Polish war, terminated by the treaty of Vienna of 1738 and the war of the Austrian succession, terminated by the treaty of Aix-la-Chapelle of 1748. There was also the Seven Years' War which resulted in the treaty of Paris of 1763. It would take too long to enumerate all the sanguinary struggles inspired by the fear of preponderance or hegemony.

Since the discovery of America and of the maritime route to the Indies, the struggle assumed a new form. Every state sought to acquire commercial supremacy and conceived that, to that end, it was necessary to acquire for its own advantage the monopoly of exchanges and exports and to create every form of obstacle to the freedom of commerce of the other states and to the development of their resources.

Such was the origin of wars undertaken to maintain what was called the balance of trade. The results of this false system designated by the name of "Colbertism," have not been less serious than those of the system of political equilibrium. Pretexts for making war were constantly sought for the purpose of compelling the rival powers to sign a treaty of commerce to the advantage of the conquering state.<sup>1</sup>

The treaties concluded in the 17th and 18th centuries as a consequence of commercial wars demonstrated clearly the confusion existing as to the liberty of commerce and navigation.

This confusion as to the rights of neutral states during war began to be dissipated only as a consequence of the leagues of armed neutrality of 1780 and 1800. Nevertheless, the states which had recognized the rules applicable to neutral powers disregarded or modified them arbitrarily, inasmuch as there was no other means to insure their respect than the force of arms.

Could the idea of a community be conceived, while false notions prevailed as regards the prosperity of nations, and while it was every government's aim so to organize its commercial relations as to import the most gold and the least merchandise in order to insure the so-called balance of trade?

<sup>1</sup> Campbell, *Lives of the Chancellors*, v. V, p. 89. See also the Speech of the Earl of Shaftesbury, Lord Chancellor, when he endeavored to prove that it was time to make war on Holland (Parliament, Hist., v. IV, p. 567).

Thus, we reach the period of the French Revolution amidst the greatest confusion of ideas and false notions as to the particular interests of each nation, the general interests of states and the just principles calculated to insure the independence of each country.

The abnormal conditions under which the wars of the French Revolution were undertaken served to justify the violence and abuses which were committed by both parties. The fact is that the most arbitrary actions were justified under color of reprisals, and that all the principles of international law were disregarded. The condition of neutral states grew worse. The rights of neutrals which had been solemnly proclaimed by various powers were grossly violated.

At the time of the fall of Bonaparte, Europe presented a new aspect; while certain states had disappeared, others had sprung up. The authority of the treaty of Westphalia had been ignored, the equilibrium had been upset. The question was to provide for the final organization of Europe, to give a solid foundation to the vital principle of the community of interests and to establish properly the just principle of equilibrium.

The experience of the past should have convinced the powerful Allies that if a certain form of balance was necessary to assure the orderly coexistence of states and to preserve their independence and rights, it was indispensable to give other bases to this equilibrium. Nevertheless, the Powers, in the excitement of victory, thought only of insuring the so-called rights of legitimate sovereigns and dynasties, taking historical right as the basis of legitimacy. It was thought that, in order to restore the equilibrium, territorial possessions should be restored to the condition prevailing before the French Revolution. In order to make this work lasting, the Great Powers, acting as dictators, decided reciprocally to guarantee to one another the possessions which they had claimed for themselves by virtue of their alleged legitimate rights, by engaging to intervene and to resort to force to repress any attack whatever upon the balance they had established. Their artificial labors were summed up in the Final Act signed at Vienna on June 9, 1815, and completed by the treaty of the Holy Alliance.

And so we arrive at the beginning of the 19th century and find that the true idea of the international community was still unborn.

It was believed, as a matter of fact, that the supreme interest of international society lay in the protection of the so-called rights of legitimate sovereigns and dynasties, and that historical right was the basis of legitimacy. It was thought that the power of legitimate monarchs was absolute; that the people had no rights whatever; that their interest was in a way represented by the interest of the Prince; that legitimate monarchies could annex territories on the basis of historical right, without taking into account either the interests of the people or the moral position of the different countries.

As a natural consequence, the problem of international organization had not been presented in its proper light. Indeed, how could an organization, whose main purpose was the preservation of the so-called rights of legitimate sovereigns and dynasties, constitute the principle of a rational institution?

Conflict was to be the consequence of this system, and of the palpable violation of the liberty and sacrifice of the rights of peoples.

Relying on their reciprocal agreements under the celebrated treaty of the Holy Alliance, governments endeavored to suppress what they called revolutionary ideas; they organized the system of armed intervention to wage war against liberty and the rights of nationalities; but all their armies put together were not strong enough to preserve the political balance established at Vienna under Metternich's inspiration.

The first great success of the new theory, which proclaimed the inalienable rights of nationalities as opposed to the pretended rights of legitimate monarchies was obtained in Greece.

The relentless struggle of the country for the recognition of its independence against Turkish rule began in 1821 and continued until 1829. In that year, the Sultan was compelled to sign the treaty of Adrianople, by the terms of which the Greek provinces were constituted as an independent state at whose head was placed Prince Otto of Bavaria with the title of King.

In the same way, in the Belgian provinces which formed a part of the Kingdom of the Netherlands, the revolution was inspired by the noble idea of defense of national interests. It resulted in the separation from Holland of Belgium, which became an independent Kingdom. This independence, consecrated by the treaty

of London of November 15, 1831, was recognized by the King of the Netherlands himself by another treaty of London of April 19, 1839.

Egypt had also revolted to win its independence, under the leadership of Mehemet-Ali, and fought against Turkey until the treaty of London of 1840 recognized the hereditary right of Mehemet-Ali as sovereign of Egypt, under the suzerainty of the Porte.

Furthermore, divers political movements broke out in 1848 and 1849 which deeply disturbed France, Germany, Hungary and Italy. Their final result was gradually to reduce to naught the hare-brained dream of Metternich, namely, the political balance of 1815, and to effect a radical change in the basis of legitimacy. For the sovereignty of divine right was substituted the free suffrage of the people.

The essentially democratic movement to which the Revolution of 1848 owes its origin was inspired by an absolute reaction against the spirit of the Holy Alliance. The greater representation of the interests of the people, the control exercised by public opinion upon both the internal and foreign policies of the majority of states, the extraordinary development of commercial relations and means of communication between the different countries, everything, so to speak, contributed to do away with unreasonable prejudices, to develop the sentiment of solidarity of interests and to bring forward the true principle of a community of interests.

Indeed, it began gradually to be understood that, in order to assure the development of national prosperity in each country, it was indispensable to facilitate the development of international relations and to guarantee and protect common interests.

2. This fundamental conception was better understood during the second half of the 19th century. It owed its success to two important factors. One was the development of international trade, which became a powerful agent of civilization by establishing permanent bonds among the different nations. The other factor, even more important, was the scientific movement, which contributed in the most direct manner to the overthrow of the past and to reconstruction upon its ruins.

It would be a long task to enumerate, even in a summary manner, the great builders who helped to tear down the old political struc-

ture and to construct the monument of modern civilization, based on the great fundamental idea of humanity. We shall mention only a few of them.

To the Italian Albericus Gentilis, among the publicists, is due the merit of having emancipated the science of international law from the authority of theology by giving it a rational basis. He was the first to teach that the rules of justice ought to be deduced from natural reason.

He had as his successor, Hugo Grotius, who perfected his work. These two learned writers gave the first serious impulse to intellectual activity in its work of total destruction of the past and of reconstruction upon its ruins. Among those who contributed to that work, special mention must be made of Hobbes,<sup>1</sup> Pufendorf,<sup>2</sup> Leibnitz,<sup>3</sup> and Wolff.<sup>4</sup> Then followed the long line of publicists who sought to elucidate and expound the rules for the government of states and the true bases of international relations.

Among those who gave the first impulse to political science, we may, with justifiable pride, mention our countryman Machiavelli, one of the first to apply to politics the historical and empirical method. His great merit lies in having thoroughly studied the causes upon which depend the establishment, conservation, prosperity and decadence of states, and in having left the most complete series of profound observations upon the relations existing between facts and the causes from which they are derived. He applied the force of his original genius to separate the domain of the State from the domain of the Roman Church and to regard the problem of the art of governing nations as altogether independent of the authority of theology. This method resulted in releasing governments from the all-powerful authority of the Church.

The detractors of this great Italian thinker have claimed that he did not take sufficient notice of the laws of justice, that he considered the art of governing from the point of view of success rather than of law and that he considered interest as the basis of politics. But, apart from the defects of his method, there is no doubt that Machiavelli has rendered the greatest service to

<sup>1</sup> *De cive*, Parisiis, 1646.

<sup>2</sup> *De jure naturæ et gentium; De officiis hominis et civis; specimen controversiarum citra jus naturale.*

<sup>3</sup> *Codex juris gentium diplomaticus.*

<sup>4</sup> *Jus naturæ methodo scientifica per tractatum.*

civilization by dissipating the false notion that the State should be considered as subject to the Church and that the Pope could assume the right to command sovereigns of States. The preponderance of the Papacy and the subjection of the State to the protection of the Church were reduced to naught owing to Machiavelli's important concept, which was to remove politics from the Church's authority and to give to governments and politics a new basis and a proper purpose.

The publicists who came after Machiavelli, adopting his method, improved the principles which he had laid down and succeeded in re-establishing the theory of government on its true foundations. Among these, we shall mention only Locke in England and Montesquieu in France.

Locke,<sup>1</sup> in his *Two treatises on government* has left us the most liberal theory of constitutional monarchies and of the legitimacy of powers. His work was perfected and completed by Montesquieu, who defended the rights of mankind, and elucidated and developed the proper principles of the greatness of states. The science of politics as independent of the authority of the Church gradually entered the domain of intellectual activity; it would take too long to mention the authors who have taken part in the great work of destruction and reconstruction, the purpose of which was to determine the true principle of political wisdom.

Among the economists who contributed most to demonstrate the fatal error of the mercantile system, we shall name Hume, Quesnay and Turgot, who foresaw the great truth that liberty is the principal condition of commercial prosperity.<sup>2</sup> The true doctrine of free trade, which brought about the great revolution which has taken place in economic life and even in the political existence of states, subsequently was clothed in its most perfect scientific form by Adam Smith. His work on the *Wealth of Nations* absolutely discredited the false theory of protection.

Among the philosophers, we might mention our countrymen Pomponaccio, Giordano Bruno and Telesio, who helped to emancipate thought from the authority of theology. But the most decisive revolution in behalf of the preponderance of reason must

<sup>1</sup> His work, *Two treatises on government*, published in 1690, was later translated into French under the title of *Essai du gouvernement civil*.

<sup>2</sup> Cf. Buckle, *History of Civilization*.

certainly be traced to Descartes. He did for philosophy what Luther had begun to do for religion; what Machiavelli had done in theory and what Richelieu and Cromwell had done in practice for politics; and what Galileo had accomplished in the domain of the physical sciences. Descartes, disregarding tradition and authority, and relying on the force of intelligence, began the vast work of destruction of the past. It cannot be said of him, perhaps, that he was a creative genius, as he destroyed more than he rebuilt; but without him we would not have had the liberal and humanitarian philosophy of the 18th century. After him, we find Jean-Baptiste Vico, who by sheer reasoning succeeded in conceiving the fruitful idea that mankind is an organism whose elements are peoples, and in describing the ideal circle within which, he believed, the world revolves.<sup>1</sup>

After Descartes and Vico, the work of the philosophers progressed rapidly and when the end of the 18th century is reached, it may be observed that, always on the basis of reason, they asserted the rights of man and prepared the way for the Revolution which broke out in 1789.

Voltaire,<sup>2</sup> Mably,<sup>3</sup> Diderot<sup>4</sup> and Rousseau<sup>5</sup> had all defended the rights of mankind, demanded the emancipation of the serfs and the suppression of war and indicated the true object of politics which, as Mably said, was justice. We come now to Condorcet who in his draft of a constitution proposes to regulate the conduct of the French Republic towards other nations.<sup>6</sup>

We shall pass over unmentioned other equally illustrious writers, who contributed to the destruction of the past and to the development of the eminently just principles of the international community.

It is an undisputed fact that we have gradually come to under-

<sup>1</sup> Compar. Ferrari, *La mente di G. B. Vico*.

<sup>2</sup> *Correspondance de Voltaire et de Catherine II; Dictionnaire Philosophique* (Words *Supplice* and *Torture*); *Extrait d'un mémoire pour l'entière abolition de la servitude en France; Satire, La Tactique* (Odes XVIII, Dialogue XXIV); *Eloge funèbre des officiers morts en 1641*.

<sup>3</sup> *Étude de l'histoire; Observations sur l'histoire de la Grèce*.

<sup>4</sup> *Fragments politiques*.

<sup>5</sup> *Émile*.

<sup>6</sup> *Projet de constitution française*, tit. XIII, *Moniteur*, 1793, p. 235; *Œuvres de Condorcet*, v. X, p. 580. See also *Lettres d'un citoyen des États-Unis à un Français*, *Œuvres*, v. IX, p. 97.



stand the great conception expressed by Seneca: "All this world that you see and which contains everything that is divine and human, is one . . . We are the members of a great body. Nowhere is man a stranger . . . The universe is his true country."<sup>1</sup>

But in order to make this conception evident to all men, it was necessary to bring out the idea foreseen by Hume, Quesnay and Turgot, that liberty is the principal condition of commercial prosperity.

It was necessary for everybody to understand that, for the benefit of all nations, the solidarity of interest of all civilized countries should come before the egotistical interests of their own country. It was also necessary that public opinion should come to realize the necessity and usefulness of community among civilized nations.

All this has been brought to fruition only in our time, especially during the last fifty years.

It is now easy to see why the problem of the organization of international society is still so far from solution. A rational organization of the international society was not possible so long as the true concept of the community and of its rational basis was not fully perceived.

J. B. Vico, in his profound work *La scienza nuova*, had claimed that the community of rights can only arise out of the community of interests, which, as he expressed it, may create in all nations certain uniform ideas as to the necessity of their association and the utility of each of them.<sup>2</sup>

Montesquieu, in his celebrated work on the *Spirit of the Laws* had also proclaimed that the great conception of community was the natural consequence of trade. "The spirit of trade" said he, "unites nations. All unions are based upon mutual needs. Two nations trading together are reciprocally dependent upon one another. If it is the interest of one of them to buy, it is the interest of the other to sell."

Now if we consider that these views have been understood only of late, that is, only during the second half of the 19th century,

<sup>1</sup> Epist. 95.

<sup>2</sup> See Vico's work printed in 1725 under the title *Principii di una scienza nuova intorno alla natura delle Nazioni per li quali si ritrovano altri principii del Diritti naturale delle genti*.

we can see why it is that as yet the international community is far from practical realization. Indeed, the question has only recently been clearly formulated.

In our time, however, most people have grasped the meaning of the true community among states, and the idea of providing the international society with a better organization thoroughly pervades the present intellectual, parliamentary, scientific and popular movement. That aim will never again be separated from the intellectual domain of the civilized world. It will impose itself irresistibly and with increasing force on the conception of statesmen and the aspirations of peoples. It does not matter whether this idea be of more or less remote realization. Every new idea progresses more or less slowly, but progresses surely by reason of its first impulse, and cannot be permanently interrupted. It develops, constantly growing in importance, and becomes a power increasingly irresistible. It spreads in the conscience of the masses and gradually becomes a popular conviction; finally, the idea succeeds in dominating all facts and in exercising an irresistible influence over all minds, and becomes, so to speak, the religion of the time until the day of its ultimate triumph.

So it is with all reforms, and such will be the history of the international community. The final result of this idea will not be the work of to-day or to-morrow, but that of time and the last expression of the progress of civilization; its full realization will occur only in a more or less remote future.

3. It would be a serious mistake to misconceive the fact that the problem of the legal organization of the international society is one of extreme complexity and most difficult solution.

For this solution, it is necessary in the first place to determine the "common" law applicable to the community of civilized nations, then to insure the effective sanction of that law, and finally to provide for efficient measures and means to settle conflicts and difficulties which may arise among states.

As to the recognition of a "common" law, it cannot be said that much has been done to establish it; but we may say that a beginning has been made along that line. The treaty of Paris of 1856 marked in that respect an important step in advance. The Great Powers, instead of confining their mission to regulating the consequences of war, as was customary in the past, established

uniform rules respecting the rights of neutrals and belligerents in maritime war.

Subsequently, several treaties were concluded designed to assure the needs of commerce, the protection of property and industry, the freedom of river navigation, the abolition of the slave trade, the development of civilization and trade in Africa, and the uniform regulation of other common interests. It would take too long to enumerate these treaties. Finally, it was proposed to establish a "common" law intended to civilize war, and to limit so far as possible its evils and dangers, and delegates of the nations even met for that purpose at Brussels in 1874.

As has already been observed, the idea of recognizing that it is the collective interest of all states to regulate certain matters pertaining to their general needs has already been realized in some measure.

So far the most serious difficulty, one considered as almost insuperable, lies in the establishment of appropriate institutions to insure the legal sanction and protection of the common law, and of legal means for settling conflicts and compelling everyone to respect established rules. The result of the lack of a superior authority and of appropriate legal institutions is that states have thus far found no other efficient means of protecting their rights than the employment of their military forces and those of their allies.

Thus it happens that states having to rely only on their military power, have all sought to be better armed than their rivals. This unfortunate tendency has resulted in a system of excessive armaments. The means of attack being constantly perfected, makes it likewise necessary for the states constantly to improve their means of defense so as to be able to oppose a more effective resistance to an increasingly efficient attack.

As a consequence of these armaments whose cost is constantly growing, the greater part of the revenues of practically every state is at the present time absorbed by military expenditures, and the requirements of every other branch of the public service are subordinate to those of the Ministry of War. Furthermore, as the ordinary resources are not always sufficient to meet the needs, governments have recourse to extraordinary taxes and to loans. The figures of Europe's debt and interest payments are stupendous.

As a consequence of this state of affairs, there is already in all

countries a movement of protest against the scourge of armed peace, which has transformed the civilized world into a huge gun factory. The complaints against the evils due to that fatal exaltation of militarism, have become in the last few years more frequent and more general.<sup>1</sup>

Publicists, statesmen, associations of manufacturers, and the workers throughout the world are all agreed upon the necessity of establishing upon sound bases the organization of the international society and of finding means to end this unfortunate state of affairs in which the principal guaranty of a nation's rights is its army and, in last resort, war.

<sup>1</sup> The associations for eliminating the evils of armed peace and the dangers of war originated in the United States, extending later on to Europe. According to the *Bureau international de la Paix*, there are 94 of these, 54 of which are in America and 40 in Europe.

The first societies of the friends of peace originated in the United States, one of the first to initiate the movement being Rev. Mr. Worcester, who founded in Boston a religious paper, in which he stigmatized the evils of war. Then came George Channing, who addressed to the Congress of the United States a memorial in which he said: "We are convinced that a government sincerely disposed to undertake the great and sublime mission of pacifying the world would not lack means for succeeding in this task. Thanks to the persistent and wise efforts of such a government, more moderate principles would prevail in the settlement of international disputes, differences between nations could be referred to an impartial arbitrator and peoples could reach an agreement for the purpose of reducing their military organizations, so great and so costly."

From America, the movement spread to Europe, especially in England, where the society of the Friends of Peace founded a paper called *The Herald of Peace*. (For more details, see the work of Descamps and the pamphlet of Catellani, *La propaganda della pace*.) Nor should we fail to recall that in 1873 there was created in London the Association for the Reform and Codification of the Law of Nations, which changed its name in 1894 to "International Law Association"; that in 1873 also, at the suggestion of the Americans Lieber and Miles and of the Genevese Moynier, the Institute of International Law was founded by Rolin-Jacquemyns, Bluntschli, Mancini and other jurists. This institution, whose object was the promotion of international law, would certainly have produced excellent results had it always been maintained within the domain which had been assigned to it at the time of its foundation.

The propaganda in favor of international arbitration as a means of eliminating war has made rapid progress and the movement has received great unity of action as the result of international congresses, in which the associations of the different countries have met. The Americans are still foremost. The jurists of that country held a congress at Lisbon in 1888 with the Spanish and Portuguese jurists to discuss the need of instituting a court of arbitration. One of the most important meetings was the Pan-American Congress, held in the United States on the initiative of Secretary of State Blaine.

4. Various plans have been suggested with a view to securing a more rational organization of the international society. This is not the place to enumerate all these propositions. Some issue from scientists and scientific associations which have studied the solution of this complicated problem; others sum up the general sentiment expressed by the associations in public meetings.

Bluntschli conceived the idea of organizing mankind as a great state, of which all the individual states were to be members. In his view, no universal empire or monarchy was necessary to attain that end. The confederation, or union of states, was sufficient. This ideal conception, however, does not appear to us more practicable of realization than Plato's Republic or Thomas More's Utopia. We readily admit that a certain community of interests may develop among men of similar origin, traditions and language, living under the same social and moral conditions, and that these men may form a state for the defense of those interests; but it would seem extremely difficult to expect the same result from the combined nations of the universe.

While not questioning the unity of mankind, it must be remembered that civilization describes a parabola and that the diverse moral conditions prevailing in the various nations will always determine certain differences in the intellectual development and civilization of the peoples of the various portions of the universe.

To give to the society of states the form of a Confederation, with its distinctive legislature, judiciary and Executive above and beyond the governments of the different states, is the basis, seemingly attractive, of the numerous schemes conceived with that end in view, beginning with those of Sully, Kant, Rousseau and Bentham, and ending with those of our contemporaries, among whom may be found Malardies, Lorimer and others. The scheme generally proposed was to constitute a permanent Congress; giving to the assembled confederated states voting representation proportional to their actual degree of power and importance and placing at the disposal of the central power an armed body sufficient to insure the respect of its decisions.

In our opinion, however, these schemes which at first sight are attractive would not eliminate the evils they are designed to remove, but would rather perpetuate them. Indeed, they are calculated to bring about the preponderance of the great powers

to the detriment of the independence of the smaller states. The same thing occurs in cases of bankruptcy, in which, inasmuch as each creditor has a vote proportional to the importance of his claim, it often suffices for the debtor to make an arrangement with his principal creditor to the disadvantage of the smaller creditors.

5. The manifestations against armed peace having, within the last few years, become more general, the measure which has been considered as expressing popular sentiment as to the best way to render armaments unnecessary and to eliminate war is *arbitration* as a judicial method of peacefully settling all international differences.

This measure has been on the program of legal and scientific associations, and of philanthropic, political, and labor associations of all nations. Peace societies have been particularly active in their propaganda in favor of arbitration; several of these societies have been founded for the special purpose of bringing about its adoption as the best means of ending the scourge of armed peace.

All these societies agree that the legal organization of international society could be effected if all the states would bind themselves to submit all their differences to arbitration.

They believe that general disarmament and the disappearance of war might thus be brought about.<sup>1</sup>

Arbitration has become popular especially since the settlement by the Geneva Tribunal of Arbitration of the important dispute between Great Britain and the United States. From the viewpoint of the gravity of the matter in issue, it is the only very important case submitted to arbitration. Other questions settled by arbitration are notable rather on account of their number than on account of the point involved. There have been some seventy

<sup>1</sup> The society which has given to the movement a truly international character is the Inter-Parliamentary Union for establishing arbitration as the system of procedure for the solution of international controversies and for the prevention of war.

The Union's first conference was held in Paris, in June, 1889, under the presidency of Jules Simon; the second conference was held at London, under the presidency of Lord Herschell; the third at Rome in 1891, under the presidency of Biancheri; the fourth at Berne in 1892, presided over by Mr. Dros; the fifth, at The Hague, in 1894, presided over by Mr. Rohasen; the sixth, at Brussels, in 1895, presided over by Senator Descamps, and the seventh at Budapesth in 1906.

cases of arbitration since 1815, the United States participating in thirty-five and Great Britain in twenty-one. But there has been no other case of arbitration so important as that of the Alabama Claims, which, had it not been amicably settled, would inevitably have led to war between Great Britain and the United States.

In that case, the particular factor preventing a recourse to arms was the realization of the British Government that a peaceful settlement of the difficulty was most desirable, as it knew that if war were declared, the United States would blockade the northern and southern ports of England and that, the cotton trade being at a standstill, 500,000 workers employed in cotton factories would have to be taken care of. The United States was likewise convinced of the advantage of a peaceful settlement. The two Governments were consequently disposed to adopt any measure which would satisfy the national pride of the United States without wounding that of Great Britain. That is the secret of the Geneva arbitration.

We do not wish in any way to lessen the importance of that arbitration. It is highly to the credit of the statesmen in power that they realized the true interests of their respective countries, and had the energy and sagacity necessary for carrying to a successful end negotiations which covered a period of six years. Great difficulties had to be overcome in order to conclude the treaty of Washington upon which the *compromis* was based. It required remarkable political wisdom to conduct the long and heated discussions, amid the excitations of the press and the recriminations of a parliamentary opposition which threatened to force the two countries into war.

It is also greatly to the credit of the jurists who composed the arbitral tribunal that they succeeded in rendering an award acceptable to both parties; and it is with a justifiable national pride that we mention the fact that an Italian, Count Sclopis, was the President of the tribunal.

But to infer from this decision that the solution of the grave problem has been found; to believe, in the present state of the case, that by making arbitration the common form of international justice the elimination of war and of disarmament have been achieved is, in our opinion, a great illusion.

6. While recognizing the great importance of arbitration, we

can not admit that the mere fact that a great number of states (as, for example, those which were represented at the Hague Conference) have agreed to sign a general treaty of arbitration, could suffice to abolish the predominance of military force and provide a definitive legal organization of international society.

First of all, it must be borne in mind that a general obligation to submit to arbitration is subjected, even by those who favor it, to the reservation that it must not involve either the dignity or the honor of the nation.

The difficulties existing between Great Britain and the United States were easily settled, owing to the willingness of both Governments, which were equally desirous of reaching a peaceful solution. Would it have been so, had one or the other considered war advantageous to its policies? If so, what would have prevented it from claiming that its national honor was violated?

Furthermore, let us consider that the necessity of armaments and the desire to be stronger than the other states are not designed to bring about the use of arms for the settlement of all kinds of difficulties, such as those concerning boundary limits, fishing privileges in certain seas, or international pecuniary claims for indemnities for private injuries sustained. Every Great Power seeks to predominate in strength in order to give weight to its preponderance in international questions, such as those relating to the Near-East and the Mediterranean. Now, whenever it is admitted that disagreements on such questions, for example, those of colonial expansion, or of influence in China or Africa, cannot be referred to arbitration, it must be recognized that it is quite natural that none of the Great Powers, obliged in such matters to rely solely upon their own strength and that of their allies, can afford to dispense with the endeavor to be the best armed.

Should the noble efforts of the scientists and of scientific societies in favor of arbitration, the propaganda pursued by all the peace societies of Europe and America, be considered as of no avail?

Should the unremitting perseverance and great wisdom of statesmen, the measures introduced in parliaments to induce Governments to engage to submit to arbitration all international disputes, be considered as aspirations without result and practical effect? Certainly not.



This trend of public opinion—a tendency which has acquired of late a better unity of direction, owing to a concentration of all the forces favoring arbitration—must be deemed without doubt the most remarkable achievement of civilization.

The votes expressed in favor of arbitration by congresses of scientists, parliaments, and popular assemblies, are the most solemn expression of the general sentiment, which is a protest against armed peace; they are the luminous expression of the thought in the mind of all, that is, to give a new direction to international politics and to make governments recognize that, instead of continuing to rely on force, their supreme duty lies in submission to justice.

And who will deny that humanitarian propaganda has not met already with great practical success? It has already acquired a footing in parliaments; but thereafter, just as success always rewards perseverance, so public sentiment against the scourge of armed peace has entered the highest spheres.

The sovereign of a powerful Empire finally had the courage solemnly to declare to other governments that armed peace was ruinous to all; that it was absolutely necessary to find a remedy to this necessity of continual armaments and that it was the duty of all governments to devise means for preventing the calamity which was threatening the whole world. For that purpose, the Czar, by his note of August 12/24, 1898, invited all the Governments of the world to agree on the best means of preventing the inevitable disastrous consequences of excessive armaments.

7. The Czar's note greatly impressed statesmen and Governments, and awakened great hopes and encouragement.<sup>1</sup> One of the difficulties was to determine the programme of the Conference. Nevertheless, the Conference assembled at The Hague on May 18, 1899, with the object of adopting measures best calculated to ensure to nations the blessings of peace and a proper limitation of excessive armaments.

The Conference did not succeed in fulfilling the great hopes of its achievements which had been entertained, nor did it succeed in developing the programme of work for which it had been called.

<sup>1</sup> See our article written at the time of the publication of the note of Nicolas II to Count Mouraviev, in the *Revue générale de droit international public*, v. V, 1898, p. 732.

Nevertheless, it laid down the primary bases for the pacific settlement of international disputes and for the substitution of law and justice for force.

The Powers which were represented there were Austria-Hungary, Belgium, Bulgaria, China, Denmark, France, Germany, Japan, Great Britain, Greece, Italy, Luxemburg, Mexico, Montenegro, The Netherlands, Persia, Portugal, Rumania, Russia, Serbia, Siam, Spain, the United States, Sweden and Norway, Switzerland, and Turkey.

The plenipotentiaries of these states succeeded in establishing rules for peacefully settling international disputes, admitting that, in order to prevent, so far as possible, recourse to force for their settlement, it was necessary to resort to all measures calculated to attain that end—good offices, mediation, examination of the facts by international Commissions of Inquiry, and arbitration. Those matters constituted the object of the first Convention, in which were formulated rules concerning recourse to good offices and to mediation; the institution of an international Commission of Inquiry, whose office would be to facilitate the solution of differences of an international nature not involving honor or vital interests, but arising from a difference of view on questions of fact, and lastly, international arbitration, having for its object the settlement of disputes between states arising out of questions of a legal nature and particularly questions of interpretation and application of international conventions. The plenipotentiaries proposed, besides, to regulate war on land between two or more Powers represented at the Conference, declaring at the same time that the provisions would cease to be compulsory if, in a war between the contracting Powers, a non-contracting Power should join one of them.

This Convention was signed on July 29, 1899, by all the states except Switzerland and China and, according to the provisions of article 3, was to enter into force from the day of its ratification by the individual Powers, with the understanding that the ratifications should be deposited at The Hague and that a copy thereof should be notified through diplomatic channels to each of the contracting Powers. On this basis were laid the foundations of the laws and customs of war on land, regulations being drawn up for determining the rights and duties of the belligerent parties and

their obligations in regard to prisoners of war, the sick and the wounded, and for defining the exercise of belligerent rights with a view to restricting the indiscriminate use of methods and instruments intended to injure the enemy.

With a view to diminishing the evils incidental to war, the plenipotentiaries agreed to make applicable to maritime war the principles of the Geneva Convention of August 22, 1864, which regulated the condition of hospital-ships, of the sick and the wounded, and of those engaged in caring for them.

The plenipotentiaries finally signed three declarations concerning:

I. A prohibition against launching projectiles and explosives from balloons, or similar contrivances. (This declaration was not signed by Great Britain.)

II. A prohibition against the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases. This declaration was compulsory for the states which subscribed it, among which Great Britain and the United States of America were not included.

III. The prohibition against the use of *dum-dum* bullets which expand and flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions. This declaration was not signed by Great Britain, Portugal, and the United States of America.

These declarations were not binding upon the states which signed them unless ratified and the ratifications were deposited at The Hague.

The Conference, furthermore, expressed various solemn wishes (*vœux*) in regard to matters which should constitute the programme of a later conference: Revision of the Geneva Convention relating to the sick and wounded in time of war; rights and duties of neutrals; adoption of an agreement regarding the type and caliber of naval guns; conventional limitation of armed forces on land and sea; immunity of private property in maritime war; and the regulation of bombardment.

Thus, the first Conference did not succeed in developing the programme outlined in the Czar's note, but established the principle that the matters on which an agreement had not been reached should constitute the subject-matter of future Conferences.

8. In a protocol signed at The Hague on June 14, 1907, having in view the fact that states not admitted to the first Conference might have adhered to the Convention for the pacific settlement of international disputes signed on July 29, 1899, the adherence of several States was recorded, namely: Argentina, Bolivia, Brazil, Chili, Colombia, Cuba, Ecuador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Peru, Santo Domingo, Salvador, Venezuela.

The problem which then urgently required solution consisted in giving a better legal organization to international society; and this undoubtedly could not be considered as solved. That is the reason why a second Conference was proposed on the initiative of Mr. Roosevelt, President of the United States of America. He proposed its meeting by his circular note of October 21, 1904, to discuss and settle various questions in conformity with the solemn wishes expressed by the first Conference, which had postponed their solution. It met at The Hague on the invitation of the Emperor of Russia July 15, 1907, and ended its labors with the Final Act signed on the 18th of October following. 44 States were represented, namely: Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Denmark, Ecuador, France, Germany, Japan, Great Britain, Greece, Guatemala, Haiti, Italy, Luxemburg, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, Netherlands, Persia, Peru, Portugal, Rumania, Russia, Salvador, Santo Domingo, Servia, Siam, Spain, the United States, Switzerland, Sweden, Turkey, Uruguay, and Venezuela.

The conventions and declarations were as follows:

I. Convention pour le règlement pacifique des conflits internationaux (Convention for the pacific settlement of international disputes).

II. Convention concernant la limitation de l'emploi de la force pour le recouvrement de dettes contractuelles (convention respecting the limitation of the employment of force for the recovery of contract debts).

III. Convention relative à l'ouverture des hostilités (Convention relative to the opening of hostilities).

IV. Convention concernant les lois et coutumes de la guerre sur terre (Convention respecting the laws and customs of war on land).

V. Convention concernant les droits et les devoirs des Puissances et des personnes neutres en cas de guerre sur terre (Convention respecting the rights and duties of neutral Powers and persons in case of war on land).

VI. Convention relative au régime des navires de commerce ennemis au début des hostilités (Convention relative to the status of enemy merchant ships at the outbreak of hostilities).

VII. Convention relative à la transformation des navires de commerce en bâtiments de guerre (Convention relative to the conversion of merchant ships into war ships).

VIII. Convention relative à la pose de mines sous-marines automatiques de contact (Convention relative to the laying of automatic submarine contact mines).

IX. Convention concernant le bombardement par des forces navales en temps de guerre (Convention respecting bombardment by naval forces in time of war).

X. Convention pour l'adaptation à la guerre maritime des principes de la Convention de Genève (Convention for the adaptation to naval war of the principles of the Geneva Convention).

XI. Convention relative à certaines restrictions à l'exercice du droit de capture dans la guerre maritime (Convention relative to certain restrictions with regard to the exercise of the right of capture in naval war).

XII. Convention relative à l'établissement d'une Cour internationale des prises (Convention relative to the creation of an international prize court).

XIII. Convention concernant les droits et les devoirs des Puissances neutres en cas de guerre maritime (Convention concerning the rights and duties of neutral Powers in naval war).

XIV. Déclaration relative à l'interdiction de lancer des projectiles et des explosifs du haut de ballons (Declaration prohibiting the discharge of projectiles and explosives from balloons).

The above conventions and the declaration each constituted separate acts and all bore the date of the Final Act, namely, October 18, 1907, the Plenipotentiaries having the right to sign them until the end of June, 1908. On that day, by virtue of the provisions sanctioned in the Final Act, the term expired which had been granted for the signature of the separate acts, except convention XII, which, it was provided (Art. 53), was to be signed on the

day of the deposit of ratifications. The said acts were signed on the day fixed by all of the contracting states, every state making certain reservations concerning various articles, as had been brought out in the general discussion.

The United States did not sign the sixth, seventh and thirteenth conventions, and made reservations as to the first.

The Conference, actuated by the spirit of mutual agreement and concession characterizing its deliberations, made the following declaration in the Final Act, affirming the principles which they regarded as unanimously admitted:

"It is unanimous:

" 1. In admitting the principle of compulsory arbitration.

" 2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without restriction.

" 3. Finally, it is unanimous in proclaiming that although it has not yet been found feasible to conclude a convention in this sense, nevertheless the divergences of opinion which have come to light have not exceeded the bounds of judicial controversy, and that, by working together here during the past four months, the assembled Powers have not only learned to understand one another and to draw closer together, but have succeeded in the course of this long collaboration in evolving a very lofty conception of the common welfare of humanity."

The Conference further unanimously adopted the following resolution: "The Second Peace Conference confirms the resolution adopted by the Conference of 1899 in regard to the limitation of military expenditure; and inasmuch as military expenditure has considerably increased in almost every country since that time, the Conference declares that it is eminently desirable that the governments should resume the serious examination of this question."

It also gave expression to the following opinions:

1. The Conference calls the attention of the signatory Powers to the advisability of adopting the annexed draft convention for the creation of a Judicial Arbitration Court, and of bringing it into force as soon as an agreement has been reached respecting the selection of the judges and the constitution of the court.

2. The Conference expresses the opinion that, in case of war, the responsible authorities, civil as well as military, should make it their special duty to ensure and safeguard the maintenance of pacific relations, more especially of the commercial and industrial relations between the inhabitants of the belligerent states and neutral countries.

3. The Conference expresses the opinion that the Powers should regulate, by special treaties, the position, as regards military burdens, of foreigners residing within their territories.

4. The Conference expresses the opinion that the preparation of regulations relative to the laws and customs of naval war should figure in the program of the next Conference, and that in any case the Powers may apply, as far as possible, to war at sea the principles of the convention relative to the laws and customs of war on land.

5. Finally, the Conference recommends to the Powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding Conference, at a date to be fixed by common agreement between the Powers, and it calls their attention to the necessity of preparing the programme of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the Conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory Committee should be charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program which the Governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This Committee should further be intrusted with the task of proposing a system of organization and procedure for the Conference itself.

Without entering into the details of the rules established in common accord between the states through the conventions indicated, which we shall cite hereafter, it is an indisputable fact that the work of the Conference, taken as a whole, constitutes the most important effort of international action toward facilitat-

ing the solution of many questions and especially toward developing the noble idea of the preponderance of justice and right in the international society.

The periodicity of the Peace Conferences, voted unanimously by the many states represented, is the surest proof of the common aspiration to find means of limiting excessive armaments. This, on the whole, affords ground for the belief that in a more or less remote future the preponderance of right and justice will prevail in the international society.

9. The solution of the problem cannot be, however, the exclusive work of diplomacy; it will be, in the last analysis, the work of the combined intellectual forces of all civilized countries. The combination of forces and the propaganda of those favoring a peaceful organization of the international society have had very important results by way of positing the problem and causing diplomacy to recognize the necessity of reaching a solution. Now, the intellectual forces of all countries are needed to indicate to diplomacy what this solution must be. If science unites all its forces for the purpose of solving the problem of the organization of the society of nations, can it be unsuccessful?

Considering that science's attempt to reclaim the rights of human individuality resulted in the memorable proclamation of the rights of man of 1789; that science has succeeded in framing legal rules for the rational organization of the family, city and state, and in drawing up the rules of political society now recognized as definite principles in the constitutions of all civilized countries,—who will believe that modern science is powerless to bring about a sound organization of the society of civilized countries?

Can it be conceded that the present anarchy will last indefinitely? Can it be supposed that science may not be able to fulfill its mission? Decidedly not, for fortune does not favor those who, discouraged by the present, lose their faith in the future.

The main difficulty lies in taking the right direction and in concentrating all intellectual forces upon a thorough solution of the problem.

To determine which direction to follow must always be the ultimate aim of science.



## CHAPTER II

### TRUE PURPOSE OF THE SCIENCE OF INTERNATIONAL LAW. INTERNATIONAL RIGHTS OF THE STATE, OF MAN, OF COLLECTIVITIES—OF THE CHURCH AND OF UNCIVILIZED PEOPLES

10. How the science of international law must contribute its share toward a complete solution of the problem of the juridical organization of international society. 11. Method pursued up to the present. 12. Necessity of ascertaining the rights of all the members of that society. 13. Objects of international law. 14. The states, man, people, nationalities, Church and collectivities. 15. International rights appertaining to them. 16. Collectivity as an object of international law. 17. Equilibrium between the Church and the State. 18. General lines of the system best adapted to give to international society its true organization.

10. In order that science may efficiently co-operate in solving the problem of the legal organization of international society, it is indispensable that we endeavor to fix the rules governing all the relations operating between the members of such society. For that purpose, it is necessary in the first place to determine among which persons and individuals these relations may exist; it is then necessary to specify the rights and duties which may flow from such relations, to fix the rules governing them and to protect the rights of and insure the observance of duties by all.

No association of free individuals may be considered well organized without a law establishing a rule of equilibrium and certain rules of proportion both between what every one may do and what every one should refrain from doing. This rule of equilibrium and proportion may insure the rational organization of a community, and should, in addition, legal means for protecting the rights of all be provided, it will be possible to acquire the respect due to the person of every one and the development of freedom in his relations with his fellow man.

It is useless to plan for international society a suitable form of organization without determining the rights and property of each member, and what every one may or may not do. So long as this

law of proportion is not found, it will be impossible to give to international society a legal organization.

There are two great republics. One has no limits to its extension, including all those who are united by the bonds of civilization. The other is composed of men united by civil, social and political interests, which take the form of a state. The principles for the legal organization of either republic do not materially differ.

To give to either form of republic a regular and rational organization would require the adoption of a system of juridical equilibrium, that is to say, the line of demarcation between what every one may do and may not do. Now, it seems to me that in order to work out the legal organization of the great republic, of the *Magna civitas*, the same method is required as that followed to attain the legal organization of political society.

The latter was the final outcome of the enlightened idea of political freedom and legal equality advocated by the philosophers and publicists of the last century, which has inspired the intellectual movement and popular aspirations up to the present, and in which people have come to claim the rights of man in opposition to sovereignty. It was the work of the Revolution. History calls it the French Revolution, while as a matter of fact it was the revolution of the human mind; it was the outcome of the co-operation of the intellectual forces of all countries which, at the end of the last century, caused the proclamation of the rights of man in opposition to sovereignty.

The declaration of the rights of man has made us understand certain rules of proportion and has led us gradually to determine the legal equilibrium of the political society. I do not say that everything has been accomplished in a perfect and thorough manner; in my opinion, however, the declaration of the rights of all those belonging to the political community and the recognition of the rights of man over the sovereign make it possible to fix the basis of the legal equilibrium. This equilibrium is founded upon the principle that within the state the sovereign is not omnipotent, and that, in opposition to the absolute power of the King, stand the intangible rights of man, the consequence of which has been to oppose the rights of man as a resisting force to the king's rights, which at one time were absolute. So one may determine the rules of proportion between what a king can do and what he has no

right to do. To-day the work goes on; the effort is to perfect the principle already secured, and to better determine the rights of the individual, of society and of the collectivity as opposed to the rights of sovereignty. The work is always aiming to perfect itself, to develop, and to better determine the rights of every one, with a view better to fix and determine the fields of freedom, and to establish more surely a proper balance.

In international society, disorder, confusion, and lack of juridical organization are caused by the fact that thus far the idea has been, first, to recognize the rights of dynasties and then, the rights of states, as if international society was only composed of the states and governments represented by those rights; as if outside of the state no one could be entitled to have and enjoy international rights. Hence the result that the state considers itself as omnipotent, that political considerations outweigh law and that the personal and temporary interests of rulers prevail over the general interests and requirements of those who belong to the international society. Finally, owing to the lack of secure legal rules, arbitrariness has sometimes had a greater power and has relied on military force, which has come effectively to predominate over the world.

Should one wish to remedy this abnormal situation and the confusion resulting therefrom, it will become necessary to resist the omnipotent force of politics and arbitrariness. And to that end, it would be indispensable, in my opinion, to specify and vindicate the international rights appertaining to all those constituting the international society, and to enlarge the enlightened concept of juridical freedom and equality, acknowledging the fact that the latter are not territorial rights, but properly international rights.

The question should be considered in its broad aspect, not from the restricted point of view of each single country and each single political community. It is necessary to concede more freedom and legal equality and to extend the benefit thereof to all the countries of the world. Freedom and legal equality should be recognized as international rights appertaining to that great republic constituted by mankind which I call *Magna civitas*.

We should determine and vindicate, in my opinion, the international rights of man, of the people, of nationality, of the Church and of other forms of society. We should also vindicate the international rights of uncivilized nations.

11. It seems to us that publicists have gone astray when describing international society as the result of the union of states such as they are and such as historical events have made them, and when teaching that the sole purpose of the science of international law was the examination of the rules designed to proclaim, determine and protect the rights of constituent states. According to them, it should be assumed that international society is composed of states only, that no relations can exist and be developed except between states, and that, consequently, the law by which such society is to be governed can only concern states.

As a matter of fact, in the great society of societies, which we name *Magna civitas*, we first found man with his personality and the rights which are his as a man, independently of his status as a citizen of a state.

Could it by any chance be conceived that man, as regards mankind and the law which must govern mankind, might lose his individuality, in the same manner as a drop of water falls into the sea? Certainly not. Man is entitled to rights of his own in his intercourse with other men and within the sphere of private relations; he has his own rights in his relations with the state, that is to say, within the domain of public and political relations; he enjoys, furthermore, rights of his own in his relations with all his fellow-beings and all the states of the world.

A consequence of his personality is to endow him with civil and political, as well as international rights, for it is man's principal and essentially personal right, in relation with all the states of the world, freely to belong to any state. He may, consequently choose his nationality and renounce the one already his in order to acquire a new one.

He enjoys, besides, the right to personal inviolability and liberty; he has the right to acquire property anywhere and to require the respect thereof; he is entitled to freedom of conscience, to the free exercise of his activities, to the free exercise of international trade. Are those rights in any respect rights belonging to man as the citizen of a particular state, or are they international rights appertaining to man as such? In our opinion they unquestionably belong to the human personality, independently of the bond uniting every one, as a citizen, to some given country.

12. Now, is it not for science, whose aim should be to eliminate

absolutism and the preponderance of force, to attempt to determine the rights of the people in relation to states and governments, and to fix the rules governing them, as well as the measures of legal protection designed to guarantee and safeguard such rights?

Another form of union existing in international society is the union arising out of the natural affinities of individuals, whose community of views and tendency to associate with one another are due to a similarity of race, language, traditions, aspirations, and to an ensemble of ethnographical, geographical and moral considerations. This is what constitutes nationality. The sentiment of moral unity animating men of the same race, speaking the same language, having for centuries experienced the same events, shared the same joys and the same sorrows, having always had the same aspirations—that is the origin of nationality, upon which peculiar and special rights are based.

An association equally important is that derived from the freedom of conscience. A more or less considerable number of individuals, of the same faith, and observing the same religious law, form a *de facto* society and freely acknowledge the authority of a chief: this association is the Church.

It cannot be denied that the Church is a natural society, the result of freedom, as all those professing the same faith may freely form a spiritual association and submit to the authority of a supreme chief who, without using any coercive means exercises over them his moral authority.

Consequently churches also are part of international society, and among them the first place belongs to the Roman Catholic Church, cemented by an existence of twenty centuries and preserved by the most compact and powerful hierarchy in the world.

The Catholic Church carries on relations with all the states of the world and from these relations are derived certain rights and duties affecting not only the public law of each country, but also, to some degree, international society as well. Should not the science of international law, which purposes to establish rules of proportion between all the individuals and collectivities constituting mankind, take up the problem of solving the situation of the Church towards States? This is a thing that international law must do in order that none of the elements which are to constitute

the object of the search for the rules of proportion or proper balance may be overlooked.

There are other forms of association, less important than churches, that must be taken into account: human associations, which, although not enjoying a perfect political organization, form a union under the authority of a chief, as represented by tribes or other analogous aggregations.

Can barbarous tribes, whatever their degree of culture, be denied the capacity of being considered subject to international law?

Supposing even that they lack all political organization and that they live their own life upon the territory they occupy, could the application of international law be refused to them in so far as it must protect the rights of the human personality?

One may say of those tribes that, while acknowledging the authority of a chief, they cannot be placed on the same footing of equality as the other members of the *Magna civitas*. One could not, however, refuse to apply international law to them as a means of regulating *de facto* relations which may be established between them and civilized states. One could not admit of a legal equality between such tribes and states, even by limiting it to the enjoyment of the rights which properly are theirs, because the necessary basis for such equality is a certain uniformity in regard to fundamental notions of law, which are indispensable for the legal community. It must be owned, however, that neither a barbarous nation nor an uncivilized tribe may be left outside the law of humanity.

There are also associations created for an international purpose which, after being recognized as such by states, may exercise their activity in the international world. In the enjoyment of the international rights that are theirs, they must likewise be governed by international law.<sup>1</sup>

<sup>1</sup> Certain forms of societies—(the result of freedom of association for a common interest)—are formed within a state. These societies are endowed with a legal personality, when the sovereignty of such state, by reason of their public interest, has given them such personality and the power to exercise rights appropriate to that end. These associations, however, may not as of right exercise their functions in foreign countries, as the sovereignty of each state may recognise juridical persons and grant them the capacity for certain acts only within the limits of the territory over which it commands. General interest may require certain associations to extend their sphere of action beyond their boundaries, but this may not take place as of right, as the previous

13. Now in order properly to fulfill its task, science must not be content to determine the rules governing the relations between established states; it must also fix the rules governing all the relations of fact and law existing between all the individuals and entities belonging to the international society.

Whether these relations exist between states, or individuals and states, or collectivities of individuals and states, and when, by reason of their nature, purpose or development, they can not be considered merely as relations of territorial interest, science must take cognizance of them.

That is why we assign to the science of international law a much more lofty and wider object than had at first been ascribed to it. We would even change its name if it were possible, so as to better express its purpose. *International law* means law between nations, law between states. The expression *Droit des gens* (Law of nations) is indeed a better one; but, in order more completely to indicate the object of the science, it would be still better to employ the expression *Law of mankind*, which well describes the great republic composed of all beings considered either individually or as groups of individuals.

In our opinion, the object of international law should be to investigate and determine the international rights and reciprocal duties which must belong to every member of such society, and to fix the legal rules governing such rights and duties and the legal measures designed to protect their fulfillment. For that purpose it is necessary to determine first of all which are the persons and subjects enjoying such rights and which may lay claim to them.

14. I believe that one should consider as a person of international society every being and institution having individuality by virtue of their own right, and capable of exercising their functions in all parts of the world. Individuality constitutes always the essential characteristic of every person. But, in order to possess

authorisation of the foreign sovereign, given as a recognition or otherwise, must always be considered indispensable.

All that we have said about the international rights of collectivities applies to collectivities existing *jure suo*, that is to say, those whose existence is a natural fact, or the result of natural factors; that is, those which must be considered as existing independently of territorial law, such, for example, as a *nation*, or *people*, and the association resulting from the unity of religious belief.

personality in international society, it is necessary that a being be possessed of individuality in his own right, and not by virtue of some form of concession on the part of the territorial sovereign.

When individuality is the result of an act of the territorial sovereign, it may be sufficient to cause the legal entity or institution to be considered as a person within the limits of the territory of the granting sovereign.

Consequently, we recognize the existence in international society of three persons: the state, man, and the Roman Catholic Church. As to the state, its personality can not be questioned, as every one admits that, as soon as constituted, it is *jure suo* a person of the *Magna civitas*.

The point as to whether man should be considered as a person of the international society is one that may be questioned. There is no doubt that man is a person in his relations with civil and political society. But that he should be considered as a person of international society, may, at first, be disputed.

For my part, I certainly do not contend that man is a person of international society in the same manner as the state, and that he may acquire and exercise the rights belonging to the state, or to contract and execute international obligations in the same manner as a government. I claim only that man, by the fact that he exists as such, exists with the personality which is his *jure suo*; that he exists with his freedom and capacity to exercise his activity not only as a citizen, in his relations with the government of the state to which he belongs, but also with respect to all the world's governments, and that he may claim from all the respect of his personality and the rights which are his, not as a citizen, but as a man. The personality *jure suo* is possessed in the first place by man considered in the civil and political society arising out of the state of which he is a citizen; but it must be conceded, furthermore, that man is to be considered *jure suo* as a person, with rights protecting his personality, in the eyes of all the states of the world.

The difficulty is greater when it comes to considering the Church as a person of the *Magna civitas*. In order to avoid any misunderstanding, I wish it to be understood that my argument refers to all churches. But it is important to consider that they have not all in fact acquired the position of a true international institution. At the present time, the Roman Catholic Church is the only true



international institution. It possesses, as other churches, not only its own individuality *jure suo*, but besides, an international organization of its own; it exercises its own rights and its activity extends over all the world. Other churches may also undoubtedly acquire some day the position of an international institution; and in such case, all my remarks may apply to any church actually enjoying such situation. But, as I have said, the position of a true international institution belongs at this time perforce to the Roman Catholic Church. And for that reason, acknowledging it to be in fact an international institution and considering that its personality (that is, its individuality as such) is its own as of right, *jure suo*, I maintain that it must be considered as an international entity.<sup>1</sup>

<sup>1</sup> The notion of international personality, such as I understand it, should not be confused with the notion of legal personality. In my opinion international personality belongs to any individual and institution enjoying *de jure* an individuality of its own and possessing *jure suo* the capacity to develop its activity in the field of international society in conformity with the rules governing such society. It does not follow that any individual or institution may claim international personality and enjoyment of the rights which (taking always into account, of course, their nature and purpose) are theirs in the international society, and which constitute their international rights.

Legal personality, on the contrary, may belong to any collectivity not enjoying an individuality of its own *de jure*, but to which the sovereign power has granted such individuality, while at the same time conferring upon it the enjoyment of certain rights.

Considering this as a thing substantially different from the other, it will readily be seen why, while granting to the Church an international personality, I do not go so far as to admit that it may claim to be considered *de jure* as an international legal entity.

Nor have I ever thought that the Church may be deemed *jure suo* an international legal entity, which would imply the acknowledgment that it may *de jure* claim the capacity to exercise property rights. As a matter of fact such capacity does not belong to the Church as an international institution, because, considering its nature and purpose, the enjoyment of property rights is not indispensable to it. And consequently, no Church, not even the Catholic Church, may be deemed a legal entity unless such condition be granted by the sovereign power of the state conformably to territorial law. (See the first edition of the present work translated by Chrétien, rules 31, 441, 442, 456, 464 and 466, and *Diritto internazionale pubblico*, 3rd ed., Torino, 1887: *Dei diritti internazionale della Chiesa*, pp. 485 et seq.)

The State alone is *de jure* an international entity, and an international legal entity possessing legal capacity and the enjoyment of property rights belonging to it as a State, such enjoyment being indispensable in order that the State may subsist as such and pursue the object for which it was created. (See my opinion (*consulio*) on the differences between Greece and Rumania

Two institutions among mankind, the State and the Church, are of a nature fundamentally different.

The State is a political institution owing its existence to political freedom and possessing its own power to govern all the relations which arise and develop within the field of national, civil and social interests.

The Church is an ethical institution, arising out of freedom of conscience and existing by reason of a religious sentiment. It is organized under the authority of a chief whose sole power is to maintain the principles of faith and to proclaim the dogma for those who wish freely and spontaneously to accede to it. He exercises his functions over the soul and within the field of conscience.

For my part, accepting things in this world as God, history, and freedom have made them, I dare not disregard historical facts. I find, in the international society, the existence of man endowed with a personality which is his *jure suo*. I establish the existence of the state, which, once constituted by virtue of the political freedom of associates, possesses a personality of its own *ipso jure ipsoque facto*. I establish the existence of the Church organized under the form of an international institution. These are three personalities, each one of which is of a different nature and legal condition.

Is the capacity of being a subject of international law the exclusive privilege of the State? Are there not, in international society, other entities entitled to international rights?

Admitting that no one may claim the international rights of the State and that therefore no one may enjoy, as a subject of international law, the same capacity as the State, how may one absolutely deny to other individualities, which effectively belong to international society, the right to claim their own international rights and to consider themselves as entitled to enjoy them?

Publicists, by wrongly teaching that only the State is a person, and that, consequently, man has no right to an international personality, have encouraged the unfortunate error that the rights of man, the rights of human personality, exist only so far as inter-relative to the Zappa inheritance, and my pamphlet *Della personalità giuridica dei Corpi morali e della Personalità giuridica dello Stato all' interno ed all' estero*. Torino, Unione Tipografico-Editrice, 1895; and *Tratado de derecho internacional publico*, 2a edicion, 1894, vol. I, chapter VII, *De la personalidad civil del Estado*.)

national public law is concerned, and that a foreigner, in so far as his private and civil rights are concerned, may be deemed outside of "common" law.

This same false theory, namely, that only the State is an international person and that it alone is entitled to enjoy international rights, has also had as a result the raising of the "Roman question."

The partisans of the Pope's rights, in view of this theory that the State alone should have an international personality, held that the temporal power of the Papacy was indispensable to secure the respect of its rights. They alleged that the Roman Catholic Church exercises certain international rights and maintains certain international relations; its head exercises the right of legation, and may conclude concordats. If it is granted that the State alone may be an international person, it appears natural for the Pope's partisans to maintain that, for the regular and safe exercise of the Pope's functions as head of the Church, and in order to secure complete guaranties, the Church must have a form of political organization as a state, and the Pope, as head of the Church, must be given territorial possessions and temporal power.

Thus, by an error, have publicists encouraged the Pope's claims, their theory going so far as almost to justify the remarkable sophism of the Papacy and of its partisans as to the Pope's alleged necessity for temporal power and political sovereignty.

Should one wish to establish the true political equilibrium all facts must be viewed in their true light; every one must be granted what is his, but denied also what is not his. This explains my theory. The precept of the Romans, *unicuique suum*, has been my inspiration.

15. What are the international rights to which every one is entitled? And how, in accordance with the declaration of the rights that every one expects, shall the political equilibrium be effected?

This is not the time to set forth at length the international rights of the State, man, the Church, corporations, associations, nomads and barbarians, as this question will later constitute the object of our study. It will suffice for the present to insist on the fundamental point, namely, that in order to effect a legal equilibrium it is absolutely necessary that the legal limitations upon the

activity of every one be determined, and that, for this purpose, it is important to ascertain and recognize the international rights of all persons and bodies, of the State, man, associations or collectivities, and of civilized and uncivilized peoples. After these shall have been determined, it will be necessary also to recognize that the liberty which any state may possess in its relations with other states and collectivities, cannot exist, except in the power to exercise their proper rights and activity, without invading the legal sphere of the rights of others.

The international rights of the State, it is generally agreed, are rights of autonomy and independence, of sovereignty and jurisdiction, of equality, of eminent domain and of representation. These rights, it is also said, should be considered as absolute. But as it is not admitted that international rights likewise belong to man and to collectivities and that such rights ought to be considered intangible, the result is that arbitrariness prevails in international society. The right of autonomy of the State, in fact, justifies everything, and in order that they may support any claim they may assert, states are endeavoring unceasingly to increase their military strength.

To oppose a legal power to the omnipotent power of arbitrariness would call for a recognition of the international rights of man and of entities or collectivities.

Man's rights comprise the rights of freedom and of personal inviolability, the right of choosing his citizenship, renouncing the one he has acquired and of choosing a new one, the right to own property, of liberty of conscience, of free activity and international trade, and the right of emigration. These are the international rights of the human being.<sup>1</sup>

<sup>1</sup> In addition to the international rights pertaining to every one as a *man*, we recognize likewise in everyone the international rights to which he is entitled as a *citizen*.

And, as a matter of fact, their status as citizens of a state constitutes the basis of civil and of political rights, and of certain international rights. Civil rights find their true foundation in the laws of every country, which determine, regulate and protect certain rights, the enjoyment of which is exclusively reserved to the citizens of the state. Political rights find their true foundation in the constitution of each individual state. The international rights of man as a citizen rest upon the treaties concluded between the state of which he is a citizen and other states.

Any person who belongs to a state as a citizen has a right, in the first place, to claim the protection of the sovereign and government of his country against

Whatever his race and degree of culture, whether he lives in political association or leads a nomadic existence, man never loses the characteristics and attributes of human nature and consequently never loses the rights which, always and everywhere, must pertain to the human personality. Therefore, it should be recognized that he may claim such rights all over the world, demand respect for them and enjoy them in every country, on the sole condition of recognizing the authority of territorial laws and complying with the provisions thereof.

Collectivities are merely aggregations of persons united by a common bond and a common interest. Naturally they enjoy their own international rights, the same as do the individuals constituting them.

One cannot deny to nations their own international rights, the more important of which are the liberty to establish and modify their own political constitution, the right to adopt the government which they think may best secure the rights of the political association and the right to expect that, once established, the government will be recognized by other states as a legitimate one as soon as it is effectively in possession of rights of sovereignty.

Nationalities, likewise, have their own rights, the principal of which is that of not being constrained to remain in this or that political association, but of being able in all freedom to unite in accordance with their natural aspirations and affinities.

I have spoken previously of the Churches and other collectivities. Let us see now what may be inferred from the facts already set forth.

That every state as well as the government which represents it should possess both autonomy and independence, must surely be admitted. But what is to be the nature of such autonomy and in-

any state or government attempting arbitrarily to violate the rights which, according to international law, are his.

But in addition to this any individual who is a citizen of a state may, in the pursuit of his business and activity abroad, claim and obtain the enjoyment of any private right, faculty, advantage, and privilege granted to the respective citizens by treaties concluded between state and state. Upon commercial treaties, consular conventions and those relating to the protection of literary, artistic and industrial property and many others, are founded special rights which may be enjoyed only by those who, as citizens, belong to the states which have concluded such treaties.

dependence? Can one speak of the autonomy and independence of arbitrary power? Certainly not.

The just limit of a power lies in due regard for the international rights of other members of the international society.

A sovereign may properly claim only the liberty and independence compatible with the requirements of international society. For that reason, he must so exercise his powers as not to violate the rights and legitimate interests of other governments, nor infringe the international rights of man or of the community, or the general requirements of international society.

Autonomy cannot, to be sure, be absolute, to the exclusive advantage of the State. In the international society, there are other individualities also invested with international rights. Now, it is quite evident that the preservation of the principle of equilibrium and the rule of just proportion requires that the autonomy of the State be consistent with a due regard for the rights of others.

From the principles above posited it follows that a state can neither prevent foreigners from entering its territory, nor subject them to vexatious measures. Neither can it expel them without sufficient reason. It cannot forbid its citizens to renounce their citizenship in order to acquire another. It cannot subordinate the right of renouncing original citizenship to the necessity of previous authorization.

There is no doubt that a sovereign right over its territory inheres in every state; but from this it must not be inferred that the state, as a consequence of its right of sovereignty, may deny to a foreigner the privilege of acquiring and devising property, subject to the regulations prescribed by territorial law.

The State cannot, by reason of its autonomy, deny to a foreigner the power to acquire, within the territory of the State, any movable or immovable property on the same conditions as citizens, or deny them the enjoyment of the particular rights comprised within the general right of property. Such a measure could not be legitimate unless, on serious grounds of public policy or social welfare, the ownership of certain specific things should be exclusively reserved to citizens.

He who agrees with my theory relative to the international rights of man will consider in quite a different light the problem

whose solution is the object of private international law and is concerned with the authority of foreign laws.

As a matter of principle, it must first be admitted that the enjoyment of civil rights by foreigners cannot be deemed a gracious concession depending upon the arbitrary power of any state; it is properly to be considered as the legal recognition of the international rights of man.

We must acknowledge, furthermore, that any person has the right not only to select the state to which he wishes to swear allegiance, but that he is also entitled to claim that the law of the state to which he belongs, upon which his legal condition and civil rights depend, as well as his personal and family status and the private rights derived therefrom, be recognized in foreign countries, and that it be app'ed to such relations, provided that the application of such law be not detrimental to the territorial public law nor to the laws governing public policy and protecting the social order.

Thus, we cannot support the opinion expressed by Fœlix, namely, that "in admitting the application of foreign laws, legislators, public authorities, courts and writers have been guided not by an obligation, whose observance may be claimed, but solely by considerations of reciprocal utility and convenience, *ex comitate et reciprocam utilitatem*." <sup>1</sup>

Instead of admitting that no state possesses an absolute and unlimited discretionary power to grant or deny recognition of the enjoyment of the civil rights of foreigners or to subordinate them to the condition of reciprocity, as it pleases, one should consider the denial to a foreigner of the right to demand the application of his personal statute as an actual violation of the international rights of man.

Therefore, one must also admit that no state can, as a consequence of its autonomy, justify legal reprisals founded upon the rule of reciprocity.

In short, remembering that neither the territorial or extra-territorial authority of a law is exclusively dependent on autonomy, but properly requires to be determined, taking into account the international rights of man, the nature of each separate rela-

<sup>1</sup> Preliminary title of his *Trattato di Diritto internazionale privato*, chap. III, no. II.

tion and social as well as international interests, the problem of private international law may be successfully placed on its true legal basis. Thus, it has in fact come to recognize the rational domain of every law, based upon the legislative competence of every state, and to submit every relation to the law governing it, according to the nature of the relation itself and to the principles of legislative competence, within the just limitations which, in the application of foreign laws, the political and social interests asserting themselves in every state impose.<sup>1</sup>

16. Let us briefly point out a few of the consequences which, from the point of view of legal equilibrium, arise out of the recognition of the international rights of collectivities.

Because a nation has a right to adopt and amend its own political constitution, it necessarily follows that states and governments have no right to interfere in the internal affairs of a foreign country, in order to prevent or hinder the free exercise of the international rights belonging to the people. Any form of either armed or moral intervention should likewise be considered as absolutely unlawful and arbitrary. Neither can the intervention designed to prevent a people from modifying the political constitution of the state and the form of government be justified upon the ground that the protection of the general interest required such intervention.

The collective intervention of the Great Powers, in order to maintain a state of things by force, thus violating the right which, according to international law, belongs to every people, cannot be legitimated by an agreement among the Powers. They may not, by reason of their autonomy, agree to settle in their own way the internal affairs of other states.

A "European concert" or an "American concert" is not enough to justify everything. The European concert should be held legitimate, no doubt, when its object is the legal protection of international law; but it should not be so considered when it is formed for the purpose of maintaining conditions in opposition to the international rights appertaining to peoples and nationalities.

<sup>1</sup> See my work: *Diritto internazionale privato*, 3rd ed., chap. V, *Principi fondamentali*, Torino, Unione Tipografico-Editrice, 1888, translated into French by Charles Antoine (Paris, Pedone-Lauriel, 1890) and into Spanish by Garcia Moreno (Madrid, Gongora, 1888).



Within the last few years,—especially in connection with Cretan affairs,—the European concert has been formed for the purpose of securing by concerted action the recognition of a state of affairs no longer in harmony with the principles which, according to our system, should govern international society. The Great Powers, unable to agree in regulating the new conditions which would result from the liberation of the Christian provinces, agreed upon the necessity of preserving the integrity of the Ottoman Empire, subordinating to that end the just aspirations of the Cretans.

In like manner, the European concert ought to have compelled the other states, including Greece, not to interfere with the right of the Cretan people to adopt the political constitution most conformable to their national aspirations.

From the principles set forth, it follows, furthermore, that as a nation has the right to provide its own political constitution and if necessary, to defend, by force, the right to modify or change it, one must agree that the acts of a revolutionary party intended to overthrow a constituted government cannot always be subject to the criminal laws applying to rebels, and that, when armed struggle assumes the character of a true civil war, rebels have the right to be considered as belligerents.

Another result of the recognition of the international rights of nationalities is that the efforts of peoples of the same nationality bent upon forming a national state, cannot be suppressed, but should, on the contrary, be respected as a consequence of a legitimate right.

Nothing can justify the recourse to coercive measures designed to preserve a state of affairs opposed to national aspirations, based upon pretended dynastic rights and treaties. Neither historic rights based on treaties nor prescription can effect the destruction or curtailment of the right which all nationalities possess of constituting themselves into states.

Having admitted international rights in favor of uncivilized countries, it is now easy to lay down the principles intended to dispel the erroneous conception that such countries may be considered as outside the "common" law. Uncivilized tribes are not indeed in the same condition as civilized peoples; the "common" law cannot be applied in the same way, whatever the degree of culture may be. Nevertheless, one can hardly imagine that any form

of aggregation of individuals could be beyond the pale of international law.

Certainly, as a matter of principle, colonization and colonial expansion cannot be questioned; one should even admit as desirable a certain proportion between the population and the territory, and that civilized countries, in order to find new outlets for their ever increasing activity, need to extend their present possessions and to occupy those parts of the earth which are not of any use to uncivilized peoples. One should, however, consider that colonization is legitimate only when exercised in a manner not in disregard of the international rights of uncivilized countries.

Colonization in relation to autonomy and to the international rights appertaining to barbarous tribes is a complex question which cannot be taken up here. I claim only that no result of a rational and equitable nature can be obtained unless the international rights of uncivilized and barbarous countries are recognized and respected like those of civilized countries.

17. And now, let us quickly endeavor to find the true balance between Church and State.

I have shown how the Church was entitled to certain international rights and how its individuality and personality as regards the faculty of enjoying and exercising its own rights were to be recognized.

Now, in order properly to determine the international position of the Church and to fix precisely the principle of equilibrium in the relations between the Church and the State, it is important to bear in mind the fact that the Church is an *institution of a spiritual nature*, and may claim its individuality and existence *jure suo*, only, of course, *within the determined scope of its nature and purposes*.

The Church may certainly demand the respect of its international rights as do the various states of the world. But what are these rights? They are:

a. The liberty of formation and organization in every part of the world:

b. The liberty of the head of the Church to communicate with followers in order to maintain the unity of dogma and faith, without resorting to coercive measures:

c. The liberty of government within the field of action possessed by the Church, as an institution of a spiritual nature.

This is the extent of the Church's autonomy and independence, the extent of its individuality and personality existing *jure suo*, to which are opposed the State's rights and the rights of other collectivities.

To sum up the question, the whole matter resolves itself into the right of liberty of conscience, an intangible right of the human person, which takes the form of a collective right whenever the followers of the same faith, scattered all over the world, form a religious association and recognize a chief to whose supreme authority they submit.

In order not to interfere with the liberty of conscience which, under the circumstances, becomes a collective right, it must also be conceded that the head recognized by such free association should have as much freedom to govern it as possible within the field legally determined by the very nature of the institution, which constitutes a true spiritual community. Then, to determine the nature of such freedom and to establish properly the respective extent of the Church's and State's autonomy, it is necessary to study very closely the nature of both institutions and of their relations with one another.

In my opinion, the relations between the State and the Church cannot be properly understood unless we recognize the principle that the sovereignty appertaining to the head of the State differs materially—by nature, characteristics, powers and purposes—from that of the head of the Church.

The correct principle of the balance between the State and the Church will appear easy of determination once we admit the faculty of both to exercise their rights, powers and functions within their own legal sphere. I mean that their relations must be established upon the basis of a complete separation of their powers.

And so, it must be admitted that any Church, so far as its constitution, organization and spiritual power are concerned, should be independent of the jurisdiction of any territorial sovereign, and that no state may hinder the liberty of the Church so far as its organization and the exercise of any spiritual authority over its followers are concerned.

The head of the Church, having the right freely to decide upon

all matters relating to the high administration of the communion, ought also to have the right to communicate with all the clergy and persons exercising spiritual functions; to convoke councils and synods; to exercise his ecclesiastical legislative power under canonical form, excluding for that reason any coercive action and any assistance on the part of public authority against persons unwilling spontaneously to accede to canonical rules and preferring to abandon their religious confession.

One must, furthermore, recognize that the persons who take part in the high administration of the Church and exercise spiritual functions in congregations, synods, and councils, cannot be responsible to the head of the State, whenever, of course, the exercise of their functions aims to regulate and develop the spiritual interests of the Church.

Any interference of the government of the State in acts relating to the high administration of the Church, provided such acts be limited to the field of spiritual interests, must be considered unlawful and contrary to the principles of international law.

Such in brief are the rights appertaining to the Church before the governments of the whole world and which, for that reason, I have called the international rights of the Church.

And now let us see what are the rights of the State, by reason of its nature as a political institution compared with the Church.

The sovereign power of every state has a perfect right to protect the interests of the political community and to subject to its laws the persons and the acts of everyone, whatever the social interests involved.

It is consequently the duty of a sovereign to control the acts of any form of association, of any form of collectivity, and therefore of any Church, not excluding the Roman Catholic Church, whenever such acts extend beyond the religious and spiritual domain to enter the field of public internal law.

The first result of this is that the Roman Catholic Church, in so far as it is considered by us an international institution, cannot establish diplomatic relations with a state without the previous consent of that state itself.

In no case can it claim the capacity to acquire and transfer property, for it is within the power of each state to grant or refuse legal personality to any association existing within it, and so it

must be with respect to the Church. So far as the acts of the government are concerned, one cannot deny that the sovereign's interference is always justifiable when the head of the Church, making an unjust use of his spiritual power, attempts, through the doctrine he promulgates, to incite and instigate the believers to disregard the laws of the State or to perform external acts contrary to the rights and interests of the State.

Admitting, nevertheless, that the inviolability of the Church's head must always be respected, although he unduly exercises his power under a canonical form, one must also recognize the right of the sovereign of any state to protect the interests of the political community against any attack from ecclesiastical power. The sovereign, therefore, confronted by encyclical letters, bills, acts in disciplinary matters opposed to the law of the State, may prohibit their public exhibition and their coming to the knowledge of the faithful. He may, furthermore, subject to the laws in force and to the sanctions of penal law persons who, in consequence of the excitations of the ecclesiastical authorities, have in the exercise of their functions, violated the rights of the State. Finally, he may forbid the promulgation by those who owe obedience to the superior ecclesiastical authorities of a doctrine contrary to the rights of the State.

*Unicuique Suum.*

The sovereign of a State cannot enter the domain of conscience, but he undoubtedly can repress any external act contrary to the rights and interests of the State and can make the guilty persons answer therefor in accordance with the laws in force, even though such acts are alleged to have been performed in obedience to and under the influence of a religious sentiment.

And so, a church must, so far as the external development of its functions and cult is concerned, remain always subject to the laws of the state in which the exterior functions and the cult are being exercised, its relations naturally falling within the scope of public internal law.

The administrative functions appertaining to the government of the Church must be subject to the general law in force in the state where such functions are exercised, whenever such exercise implies relations within the domain of municipal public or private law.

The independence of the ecclesiastical government, for example, certainly cannot claim to be endangered by reason of the fact that disputes which may arise between the administration and private persons in consequence of administrative acts are referred to the ordinary courts. Supposing that the head of a pontifical congregation, in the necessary conduct of its affairs, had signed a contract which had caused litigation, could one truly deny to the ordinary courts the jurisdiction to settle the controversy and claim that, if we admit such authority, the independence of the ecclesiastical government has thereby been endangered? In our opinion, certainly not.

To sum up, the relations between Church and State must be based on reciprocal liberty and independence. Free Church and free State—always, of course, in the sense that freedom, which may be claimed by any one, is the freedom *to exercise our powers and to develop our activity within the limits of our own right*.

It is, consequently, the duty of every state to repeal all laws restricting the freedom of the Church and to prohibit all interference of the political authority in matters relating to the exercise of the spiritual power and to ecclesiastical functions.

It is the duty of all churches and of the head of the Roman Catholic church to renounce all claims whatever to territorial sovereignty and any exercise of the rights of political authority.

18. At this point, I beg leave to sum up the ensemble of the system which, in my opinion, may be best designed to give international society its true political organization. We must endeavor to arrive at the declaration and vindication of the rights of all members of the international society. It is necessary to broaden the conception of freedom and equality and to consider both not only as territorial, but as international rights as well.

Nevertheless, by accepting the concession of international freedom and of international legal equality, it does not follow that they may all claim the same legal status and capacity.

International legal equality means that each must be equal to the others so far as the legal capacity determined by his legal status and the enjoyment and free exercise of his own rights are concerned.

Therefore, it is quite evident that individuals, peoples, nationalities, Churches and other collectivities cannot claim all the rights

appertaining to the State. Each can have only the right which belongs to it, according to its own legal status.

It is manifest, for example, that the capacity to conclude treaties can be possessed by no one but the State, which is due to the fact that the State alone can contract an international obligation and stipulate the terms of a treaty. Neither man, nation, people (before they constitute a State) the Church, nor any other association can conclude a treaty or contract a true international obligation.

An international obligation, unlike the obligation which may exist between private parties in civil or commercial matters, is, by nature and object, an obligation of public law and political law. A treaty whose object would be the obligation to give, or to do or not to do a thing, or whose object would be to regulate or limit the exercise of the respective rights or to annul or modify previous obligations, can be entered into only by the State, as the international obligation can only be assumed by the State. Such obligation, as a matter of fact, always bears the characteristics of a material obligation, or is of a nature seriously affecting the economic life and financial interests of all the community, or of a political nature affecting the life and personality of the State. It is quite evident, therefore, that the State alone can conclude a treaty, as the obligation contracted by means of a treaty is one of public and political law, and represents always an obligation of the political community *uti universitas*.

It is clear to my mind that the capacity to contract an obligation of such a nature is one which can belong to the State alone, which is a political and public institution. My theory, therefore, does not contradict the aphorism of publicists, according to which only the State can be considered a subject capable of assuming an international obligation to other states and to subscribe a treaty; an aphorism from which they have deduced the principle that the State alone must be considered a subject of international law. Thus, it must be agreed that the capacity of each depends on his legal status; consequently, it is not difficult to understand that, granted the existence in the international society of various individualities and collectivities, and that all must be considered subjects of international law, still it cannot be admitted that they all have the same legal status and capacity.

Not even the head of the Roman Church has the power to con-

clude treaties. Such power ought to be denied him for the simple reason that the Church is not a political institution, but an institution of a religious nature, and for that reason, he is not qualified to assume an obligation of a political nature. No one can prevent the head of the Church from concluding with sovereigns of different states conventions designed to regulate by agreement the exercise of their powers in all matters concerning common interests. But the conventions called "Concordats," referring always to matters of public internal interest, fall for that reason within the domain of the public law of each state and not within the sphere of international law.

What we have said may serve to indicate roughly the way which must be followed in order to give to international society a proper legal organization. It will take a long time to attain that end and success will come only in a more or less remote future. It will be the work of time and civilization; it will be the final result of the evolution which must take place through the co-operation of the intellectual forces of all civilized countries.

It is well to bear in mind that in determining the principles of equilibrium and in regulating the exercise of rights and liberty in the modern state it was necessary to correct many wrong opinions, to destroy many prejudices, and to go through different cycles: e. g., the preponderance of the sacerdotal caste; class privilege; the autocracy of monarchs; pre-eminence of dynastic politics; sovereignty of the people; and parliamentary sovereignty.

And the same will be true in attaining that arduous, complex and difficult object, namely, the legal organization of international society. It will be reached only by a transition through various cycles. That will be the task of science and the work of time and civilization.

The sages of centuries ago unceasingly advanced and perseveringly struggled, united, under the motto: *Equality and Liberty*. Their efforts have resulted for us in the great benefit of the organization of the political community. It is incumbent upon us to follow the good road and to struggle united under the motto: *Mankind, Fraternity, Cosmopolitism*, in order to hand down to our successors the rational organization of international society.



## CHAPTER III

### FORMULATION AND LEGAL PROTECTION OF INTERNATIONAL LAW

19. Method of enunciating the "common" law. 20. The Congress and its authority. 21. Its constitution. 22. The confederation of states as a means of maintaining order in the international society. 23. Codification of international law. 24. How to insure full efficacy to the international jurisdiction. 25. The Conference. 26. Arbitral jurisdiction. 27. How to make it effective. 28. Diplomatic action, good offices, mediation. 29. Efficacy of public discussion. 30. Coercive measures short of war. 31. Conclusion.

19. One of the greatest difficulties to overcome in order to attain progress—the realization of which is the aim of science—is to find a method of formulating and announcing the rules which should constitute "common," law, to make such rules binding as law, and to insure their universal respect.

The difficulty is all the more serious and complex because the idea of a state possessing over others superior authority, by which it might impose its will upon them, is one that cannot be entertained.

After the Congress of Aix-la-Chapelle of 1818, the five great European Powers believed that they had the right to constitute themselves as a permanent council to regulate, by common agreement, European affairs, and to exercise a veritable hegemony over the minor states. The development of more accurate legal views, however, and the progress of civilization took from this Council, called the Pentarchy, all its power. The principle of the legal equality of states is inconsistent with the preponderance of certain states over others.

One should bear in mind that the purpose of the common law of the international society must be to declare and guarantee the rights of all and to regulate all the relations and interests of the members of that society. This law must not be proclaimed for the sole advantage of states and governments; its object should also be to protect the rights of nations, nationalities and collectivities,

which should themselves, in their relations with the State, be governed by the law common to them all. It should contribute to preserve the balance of all active forces and to determine the rule of proportion between what everyone may and may not do.

Inasmuch as the law of the international society must be proclaimed in the interest of all its members, it is evident that the right to determine this "common" law cannot be the privilege of any one member of that society. One must likewise bear in mind that, since all human things are subject to the law of evolution, the same axiom applies to international relations at various periods. It is, therefore, necessary that the laws which at the present time may govern legal relations in the international society should not hinder future progress and should take sufficient account of the evolution such relations must experience. These cannot be immutable and permanent. Consequently, it will be expedient to determine the laws most suitable at any given period to govern international society, and it will be necessary for that purpose to take into account historical conditions—the result of intellectual activity, culture and the progress of civilization.

Such is likewise the general rule applying to all branches of human law. Man cannot lay down absolute, immutable and permanent rules. He must not forget that the laws intended to regulate any form of relations must be based on principles of natural justice; but as he is always supposed to take historical exigencies into account, he should lay down legal rules suitable to the circumstances of the time.

Accordingly, the common law of the international society should be formulated and declared binding by the members of such *de facto* society, interested in providing themselves with a law to govern their association. Another result is that, as such a law is subject to evolution, it is quite useless to establish a permanent legislative power.

20. Consequently, the best policy, in our opinion, would be to create a legislative assembly, in which all those having *de facto* relations with one another in the international society would be represented. This assembly would constitute the Congress, to be composed of the representatives of all the states desiring to organize into a union, and of members directly elected by the people of such states.

The Congress, we believe, should not be a permanent organization, but should convene whenever the historical exigencies of the international society require the declaration of new rules or the modification of existing rules. It should then adjourn directly after accomplishing the task for which it convened.

In order clearly to explain our idea, we say that we believe it indispensable that the assembly be composed both of the representatives of the State and of those of the people. As previously pointed out, the people have international rights which may be distinct from those appertaining to the State.

I have said that it seems to me indispensable to dismiss the idea of a permanent Congress, for, inasmuch as any human law must follow the progressive movement of evolution, there is an incompatibility between such movement and any permanent legislative authority.

#### 21. How should the Congress be constituted?

So far as the representatives of the states are concerned, we agree that they may be designated by the sovereign of each state, two in number, for instance, without any difference between great and small states. This we consider indispensable to give to the assembly its true character. If the Great Powers could have more representatives, or their representatives have more votes, the result would be to give the ascendancy to those Powers and, indirectly, to admit that superior force might constitute the basis of a pretended legal authority.

The true organization of the international society is not possible unless all the states, when it comes to draw up the "common" law, occupy a position of legal equality. Common law does not favor the interests of any particular state; it concerns the general interests of all society. It must, therefore, be admitted that all the states desiring to organize into a union have an equal interest, as states, in formulating the common law to govern their relations.

The representatives of the people in the Congress would be elected by the people themselves, according to a special elective system provided by the law of each country, and distinct from the system in use for political elections. The law governing the election to the Congress of the representatives of the people should, in our judgment, sanction the principle of restricted and limited suffrage, inasmuch as, in order to arrive at a judicious choice it

which should themselves, in their relations with the State, be governed by the law common to them all. It should contribute to preserve the balance of all active forces and to determine the rule of proportion between what everyone may and may not do.

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would seem necessary that the electorate be limited to the well-informed classes.

We do not favor the election of the representatives of the people by parliament, because with the parliamentary system where the majority represents the Government's present policy, the members of the Congress so elected would merely reflect the policy of their country's parliament.

The Assembly or Congress, as we conceive it, would not be constituted permanently. It should not be allowed to become an institution hampered by tradition; it should be an assembly constituted from time to time to settle certain international questions. We fully realize that the system we are suggesting will not become a reality either at the present time or in the near future. We are urging it only because we think that all the other systems suggested are inadequate. Such systems either require a complete transformation of international society, and for that very reason are impracticable, or else they sanction the preponderance of the Great Powers over small states and may cause politics to prevail over right, and as such are equally dangerous.

22. In our book, published in 1865, we examined the proposal of a confederation of states as a mean of preserving order within the international society and of eliminating war. Such a measure had been suggested by several jurists, who had in view the formation of an association between equals, all the members of which would be so dependent on one another that any arbitrary act on the part of any one of them could be forbidden.

This is the system conceived by Rousseau in his *Project of perpetual peace*. All the European Powers were to unite in a confederation; a legislative body would represent the central power and could enact laws and issue general regulations for the government of the Confederation; a judicial body would be entrusted with the application of the regulations designed to settle all differences; a central authority would have the coercive power to force the confederated states to abide by the "common" law and to induce them to comply with their obligations.

This project was favored by many. Its main fault was that the Confederation, like the Germanic Confederation, would have been composed of sovereigns, and that it was proposed to organize a central armed power for the purpose of eliminating military preponder-

ance. How could one expect the triumph of justice under these circumstances? Justice is not always found on the side in which political interests predominate; it is found at its best in the conscience of the people and in the impersonal domain of public opinion. How, on the other hand, could one lastingly assure the legal equilibrium between the interest of the Great Powers and the interest of collectivities and nations? <sup>1</sup>

As a matter of fact, international society includes states, individuals and collectivities, and each one of its members has international rights as against the others. Now, in the natural order of things, such society ought, we think, to provide a law for its organization.

These two considerations have led us to believe that the co-operation of all the parties concerned should be deemed indispensable. We cannot concede either the superiority of the Great Powers over the minor states, or the exclusive authority of governments, or any privilege. It is best to allow all the interested parties to participate in the making of the common law.

The realization of our scheme does not call for a complete modification of the present organization of international society; it only requires the perfection of that organization. Moreover, we are already following the right direction. All the states, great and small, have been convoked in the Hague Conference. This fact constitutes a precedent of importance. It has thereby been recognized that the international society of states must be a true association of equals, and that an assembly meeting to draw up general regulations cannot comprise merely the representatives of the Great Powers.

<sup>1</sup> This is what we said in our book published in 1865, in opposition to this proposal: "We ask the partisans of the permanent Congress and of the permanent Court: What assurance have we that in this congress of Princes justice will truly prevail? To expect such justice, sovereigns, in the first place (the most inveterate sinners the world has ever seen), would have to be converted. And should the interests of the Great Powers supersede justice in the permanent Congress, one would have to justify their omnipotence by placing all armed force at their disposal, and, by paralyzing the other states, condemn them to inactivity. If the interest of the minor states is, in the Germanic Confederation (which inspired the scheme for an European Confederation), sacrificed to that of the two Great Powers belonging thereto, why should we not suppose that the same will be true of the European Confederation?" (*Op. cit.*, Chap. VI, *Della confederazione degli Stati come mezzo per prevenire la guerra*, p. 350, French edition, p. II, p. 190-191.)

The only thing lacking to make such an assembly conform with our scheme, is popular representation, which, we may hope, will ultimately prevail. Perhaps the Interparliamentary Union might demand and obtain popular representation.

23. What should be the purpose of an assembly organized along the lines stated? Should it be to undertake the drafting of a real international code?

The idea of codifying international law has been urged as one of the means of bringing about the legal organization of international society.

First, let us note the fact that the codification of a part of the law, whatever part it be, can only be the final outcome of long and scientific preparation and labor. The codification of international law, even limited to civilized countries, would be an untimely undertaking. In our opinion, the assembly should limit its work to fixing by common agreement the rules of the common law, which may constitute a new basis of organization of international society and result in ending the present situation, in which force prevails over right. In fact, to attain practical results, one must not overdo things and be content with slow progress.

The work begun at the Congress of Paris of 1856 should be carried on, and be directed toward fixing those principles of the *modus vivendi* which are most urgent and are most generally and consistently recognized. This Congress laid out the rules concerning the obligations arising out of neutrality, the suppression of privateering, and the rights of belligerents in time of maritime war. These rules are merely the expression of the legal principles consequent upon prolonged legal work, whose adoption was demanded by the public opinion of civilized countries. The wisest plan would be to fix the rules on which an agreement is most likely to be reached, because public conscience demands them, and to place them under the collective guaranty of the states recognizing them. As to the points on which differences of view exist, it will be necessary to wait until science and civilization have opened the way to an agreement. As regards certain matters of common interest, we shall have to wait until a common opinion shall have been expressed as to the necessity of a partial codification.<sup>1</sup>

<sup>1</sup> We have already developed this idea in our lectures given at Brussels. We had, indeed, formulated this view in the early stage of our study of the



We cannot better express the true purpose of future congresses, as regards the codification of international law, than by quoting Rolin-Jacquemyns: "The progress of science and of law in this matter of codification," he says, "may be somewhat likened to the land cultivated, near the mouths of the Scheldt, over the area formerly covered by water. The riparian owner, patient and experienced, does not hasten to dam up the area left uncovered

matter; for, on page 277 of our work, published at Milan in 1865 (*Nuovo Diritto internazionale pubblico secondo i bisogni della civiltà moderna*), we said:

"The Congresses should not, in our opinion, attempt to limit war and disputes, but ought to study the means of preventing them. Since the Congress of Paris opened up a new era in the history of diplomacy, we hope that the meetings of sovereigns will become as useful as they have, till now, proved harmful. The Congress of Vienna represents to our mind the last form of what congresses have been in the past; the Congress of Paris is the beginning of what congresses will be in the future. Thus, as the former ends the old history of diplomacy, the latter is the beginning of its modern history.

"We know that reforms cannot be realized at once. The intrinsic perturbations of law can only be remedied gradually by successive reforms and continuous efforts; but we feel certain that public opinion,—that all-powerful ægis of the public law of the future, with its hundred voices, like hundred-eyed Argus—will be the guide-posts of future congresses."

Again, on page 293 of the same work, we said:

"We hope that the program outlined at the Congress of Paris will be more thoroughly developed in another general European congress, and we desire that important congresses shall meet, not after a bloody war, but in time of peace, to lay down the principles of the new international law, upon which must be based the existing social order.

"The European Powers declined the invitation of France to meet in a congress in order to settle the many questions which are compelling Europe to remain under arms in time of peace and constitute an obstacle to public prosperity. But the only reasons which caused the Great Powers to decline that invitation were self-interest and the love of unsound politics. As a matter of fact, they saw the need of adopting new principles in contradiction with the policy they had hitherto followed, and that they further intend to follow. But the need of a general congress is felt even by the Powers opposed to it; and what will bring them to discuss the questions that have disturbed, and are still agitating, Europe, will be the force of events and the indestructible power of public opinion.

"The most powerful protection of the right of peoples, and the most powerful force likely to end the exterior perturbations of states, is public opinion, sovereign of the world, as Pascal called it. Diplomacy would deny the secret of its power, but it is nevertheless certain that, sooner or later, diplomacy will have to take it into account, because it is implacable, unbridled, and immutable. It cannot be subdued by interest, nor subjected by force, because it is impersonal. The force of public opinion lies in its impartiality, and we are fully satisfied that it will reconcile the Powers to the idea of the meeting of a congress, and compel them to acknowledge principles of law hitherto disregarded and violated in the interests of sovereigns."

by the receding water, for fear that a violent return of the tide may take away from him more than he had been eager to appropriate. He waits—as he expresses it—until the alluvion is ripe. Similarly, the codification of international law must be like a progressive damming of the matured parts of the law against the waves of arbitrariness.”<sup>1</sup>

24. We have attempted thus far to determine the law which should govern international society; but it is necessary, besides, to insure the respect of established rules, and to find, as a means of coercion, a rational system other than the recourse to force.

We leave aside the constitution of an international permanent court. Besides, as we have said, we consider arbitration as inadequate.

An arbitral court could not settle all difficulties, for certain disputes cannot be submitted to it as involving general interests and the existence of international society.

And so, without underrating the importance of arbitration, we favor a different institution, the *Conference*, which would become a sort of arbitral court, to which would be referred those disputes which, by their nature and object, cannot be submitted to arbitration.

To our mind, the Conference should represent a sort of executive and judicial power. It would not be a permanent body, but an institution with a well-defined purpose, to be constituted whenever circumstances might justify it. It should be given the necessary power to insure the respect of the international laws promulgated by the Congress, to prevent disturbances arising out of the non-observance of such laws and to apply them towards settling disputes of a complex nature which may disturb peace and the legal organization of international society. The Conference should consequently, we believe, represent a sort of arbitral court, but of a superior order; its purpose would be to preserve in the international society the legal organization established by the Congress. In order to attain a true international organization, it is necessary to find the principle of equilibrium, and to define accurately the attributes of any institution. Arbitration is a useful institution and if, under the present conditions, governments, seeing the advantage of peacefully settling differences, undertake

<sup>1</sup> *Revue de droit international*, v. IX, p. 147.

to consent to arbitration (even in a limited manner), they are thus clearly manifesting their desire to prevent international disturbances. But, we repeat, the international questions liable to disturb peaceful relations and to bring about a general conflagration, are those complex questions which by their nature cannot be submitted to arbitration.

Such disputes ought to be referred to the Conference. As they are not of daily occurrence, it is not indispensable that the Conference be a permanent institution. It should convene only when a dispute arises within the domain of its jurisdiction.

25. How should the Conference be constituted? It should, we believe, comprise two delegates from each of the Great Powers, appointed by the governments at the time of the meeting of the Conference; the delegates of the government or governments directly interested in the case; and finally the representatives of the people, specially elected by the people for the Congress.<sup>1</sup>

The delegates of the Great Powers and the people's representatives ought to have a deliberative voice. The representatives of the state directly interested in the pending question ought to take part in all the discussions, but without any right of vote.

According to the system proposed, any of the states belonging to the union might call a meeting of the Conference. Such meeting would take place whenever a dispute has arisen between two or more states concerning the interpretation of a rule of law proclaimed by the Congress, or concerning any principle of general or common law, provided the question could not be settled by diplomacy.

26. Now, let us take up arbitration. The purpose of arbitration must be to settle all questions of personal interest arising between two or more states by applying rules of common law laid down by the Congress, or rules arising out of treaties concluded between the parties to the case.

Everything relating to the formation of the arbitral court: choice of the arbitrators, qualifications required to be an arbitra-

<sup>1</sup> In order that our idea may clearly be understood, we may say that, as the communal or provincial council selects the *Junta* from its own members, so the members elected by the people for the Congress should, before the Congress adjourns, select among themselves the members for the Conference, when such Conference eventually convenes. These members so nominated might number seven, for example, or be more numerous.

tor, procedure of the arbitral court beginning with the *compromis*, annulment or suspension of the *compromis*, rules to be observed by the court in order to render an award and make it operative, causes of nullity entitling the parties to take exception to the award—all this should be provided for in general regulations enacted by the Congress.

There is no necessity here to examine the principles governing the general rules relating to arbitration. It is merely necessary to determine what we consider essential to give to arbitration its full operative power.

Let us suppose that the point at issue is one concerning a particular interest, which, as we have said before, may be referred to arbitration, and that one or other of the parties declines to submit to arbitration and threatens to disturb the peaceful relations existing between itself and the opposing party. The difficulty thus arising would constitute a question of general interest. Indeed it is a matter of common interest to prevent complications which threaten or disturb the peaceful relations of states, since an arbitrary act in the international society constitutes a danger for all, and not merely for the state against which such act is directed.

It should not, in our opinion, be left to either party freely and arbitrarily to accept or decline arbitration, for otherwise a true legal organization would be created in appearance only. We do not go so far as to consider arbitration as an institution capable of eliminating absolutely all danger of war; but we maintain that it must be considered as capable of bringing about the peaceful settlement of any question within the domain of arbitral jurisdiction.

We believe, therefore, that the submission to arbitration, may, if not willingly accepted, be imposed.

The voluntary submission would always arise out of an express clause of a treaty under whose provisions the parties may have agreed to submit to arbitrators any misunderstanding which might arise between them, or out of a special *compromis*, under which they may have bound themselves to refer to arbitrators some particular legal dispute.

Compulsory arbitration should be the result of a deliberation of the Conference which, by affirming that the point at issue is

justiciable by arbitrators, would impose arbitration on the parties in the absence of a *compromis*.

27. Accepting the conception of the Conference as we do, its aim would be to prevent international difficulties liable to disturb peace. Consequently, it ought to be entrusted with the mission of giving to arbitration its full effect, and of deciding that the parties should submit to arbitration when the nature of the dispute is capable of submission to arbitration.

The Conference should also have the power to compel the parties to execute the arbitrators' award.

The method to adopt, we believe, might be as follows: Let us suppose that a dispute arises between two or more states, and that, in the absence of any contractual agreement, one of the parties should claim that, the case being of a nature to be submitted to arbitrators, it is willing to agree to arbitration, and so notifies the other party. If, following this diplomatic notification, the other party should persist, while maintaining its contentions, in refusing to agree to arbitration, the adverse party, after establishing such refusal, could appeal to the Conference and the latter would have the right to impose arbitration.

The Conference could be appealed to even where a *compromis* exists, when one of the parties refuses to accept arbitration because the object in dispute is alleged to be outside the terms of the arbitral agreement, or when one of the parties claims that, in the particular circumstances of the case, the object in dispute could not be referred to arbitration, notwithstanding the agreement of both parties to refer to the decision of arbitrators any difficulty whatever.

Now let us suppose that the party found in the wrong by the arbitral court should refuse to abide by the award.

It is absolutely necessary, in order to make arbitration really successful, that the execution of awards be assured. The arbitrators' decision must as a rule be considered as final and as settling completely the question submitted to them. Therefore, the parties must recognize in the decision of an arbitral court the authority of a final judgment and execute it fairly, without reservation or restriction. Should one of the parties refuse ultimately to execute an award and if, the other party insisting, it should persist in its refusal, it should be determined whether such refusal is legitimate

or not. The decision of such a question would lie with the Conference.

It might happen that such refusal is based on the alleged nullity of the award. In order justly to weigh such a contention, it would be necessary that the general regulations on arbitration, drawn up by the Congress, should fix and determine the grounds for nullity which might be invoked against an award. It would be quite proper, furthermore, to charge the Conference—whose duty, according to our system, it should be to insure the observance of the rules adopted by the Congress—with the decision as to whether the refusal to comply with the award because of nullity is legitimate or arbitrary, with the faculty, in appropriate cases, to suspend the execution of the award either wholly or in part, or to compel its execution.

28. Among the measures calculated to prevent international difficulties must be mentioned diplomatic action, good offices and mediation.

It is not merely to fulfill a humane duty, but also to protect the interests of its country, that every government must co-operate and employ its moral influence to settle a dispute arising between two states. At this time, in fact, the interests of all countries are so completely interdependent, that no event can take place in any part of the world which affects merely the personal interests of the parties concerned. International trade has made the division of labor and the maintenance of peaceful relations between all states an absolute necessity. Any disturbance always brings about within a state economic and social unrest. The true aim of a prudent and shrewd policy must be to reconcile the interests of each country with those of other countries. Any diplomatic action tending peacefully to settle conflicts between states must, consequently, be considered not only as a humane action, but as an act of wise policy.<sup>1</sup>

29. Public discussion will prove one of the best means of contributing to the pacific solution of disputes. It is important to place the question at issue squarely before public opinion, in order that it may pass judgment.

The mysterious power of public opinion is growing constantly,

<sup>1</sup> See our article published in the *Digesto italiano*, s. V°, *Agenti diplomatici*, § 385 et seq., *Della vera missione della diplomazia*.

now that the telegraph informs us with the swiftness of thought, as it were, of anything that takes place in the most distant countries. In proportion as the sentiment of solidarity of the civilized nations develops, they will better understand their common interest in assuring the dominance of the principles of justice over those of politics. Public opinion will be increasingly better informed, in proportion as popular representation assumes a larger share in the government of public affairs and in the direction of foreign policies. Within each state, public opinion may be influenced and corrupted by the intrigues of politicians; but public opinion in the world at large is always impartial, just as it is impersonal and disinterested. It is called upon to exercise an ever-increasing moral influence over diplomacy. Discussion taking place in broad daylight, it will be more difficult for politics to prevail over right, and for governments to upset with impunity the equilibrium of the international society.

It is this that suggests to us, as a rule of common law, which the Congress could formulate, that whenever a dispute arises between states of the *Union* which has failed of settlement through diplomatic negotiations, good offices, and mediation, the parties should acquaint the other states with the cause of their misunderstanding.

The state claiming injury should be bound to specify, through a diplomatic note addressed to the other governments, the reasons upon which its claims are based. The other party should likewise explain its conduct in a note addressed to the same governments.

All the communications should be made public, in order properly to enlighten the discussion and squarely to set forth the conditions of the international dispute to public opinion.

If, after such a public discussion, the party in the wrong should persist in its claims, the question could be referred to the Conference, to decide whether the matter in dispute is within the jurisdiction of an arbitral court or within its own jurisdiction.

In the former case, the Conference would order that the question be brought up before the arbitral court, and arbitration would be imposed.

Should the matter in dispute be complex and should it be feared that peaceful relations between the states organized as a *Union* might be disturbed, the Conference could decree the coercive

measures necessary to insure the observance of the common law which should govern international society.

In this order of ideas, one could justify collective intervention whenever it should be necessary to safeguard the authority and the observance of the common or general law.

For it must be admitted that it is the duty of all the states organized as a *Union* to assure the respect of the common law established by them through legal measures provided in conformity with international law. The particular law established between two or more states by treaty may be the object of protective measures agreed upon by the parties, provided that such measures are not contrary to common law. Nothing more effective could be found to safeguard common law than the collective legal protection of the associated states. The Conference which, under our system, must assure the respect of international law by all the world must justly be considered competent to determine the measures best adapted to that end.

The Conference would, consequently, be competent to decide whether a state or a people have so acted as to violate common law. To prevent an unlawful act, it should be given the power, in the first place, to order the use of all the peaceful means usually resorted to in settling disputes, that is to say, good offices, mediation and all forms of diplomatic action. It could, consequently, entrust a Power with the mission of acting as mediator to the parties. In such case, in order properly to fulfill its mission, the state so designated ought to have the right to request the submission of all the documents relating to the dispute, to seek information concerning the nature of the dispute, to examine the diplomatic negotiations and the supporting documents of all the parties. It should weigh in good faith and impartially the reasons invoked in support of the reciprocal claims of the parties, and should act as a wise and prudent conciliator in order to remove all difficulties and endeavor to bring about between the opponents an agreement or a reasonable compromise.

If that be not sufficient, if the party in the wrong should persistently refuse to yield, the Conference could finally order the use of the coercive means authorized in times of peace, without resorting to the disastrous and terrible method of war.

This is a case where collective interference (or what we would



call the European or American Concert) is fully justified. The concert cannot compel the world to accept the decisions of the Great Powers; but we must consider as legitimate and conformable to justice the collective protection of common law, whose respect it would insure by applying to any state violating it the peaceful coercive measures decreed by the Conference.

30. We do not think it necessary to dwell at length on the subject of lawful peaceful measures other than war. As a matter of fact, no one can deny that, if a state refused to respect common law, to comply with the decisions of the Conference, or to execute the awards of an arbitral court, the Conference should have the right to decree the use of coercive measures lawful in time of peace. According to our system, such measures should be decided upon by the Congress. Everything relating to general interests would be within its domain. It would have to regulate the international society formed by the states constituting the *Union*, and to lay down the rules for the collective legal protection of common law. It should also have the power to provide for extraordinary means to prevent an impending war, or, after it has broken out, to interrupt its disastrous consequences.<sup>1</sup>

Among such measures, we admit the commercial or pacific blockade, provided it does not assume the same character as the blockade resorted to in time of war.

31. The system thus set forth has guided us in the study of the principles which we shall develop in the course of this work, although at the same time we do not believe that its immediate realization is possible. This great reform will be the work of time and evolution. We have merely attempted to point the way which must be followed, with the object of inducing every-

<sup>1</sup> This idea to give to Congresses a purpose quite different from the one they now have and to consider this reform as the most useful measure for the legal organization of international society has been my constant conviction from the very beginning of my studies on this subject. In the book published at Milan in 1865 under the title *Nuovo Diritto internazionale pubblico secondo i bisogni della civiltà moderna*, which was translated into French by Pradier-Fodéré in 1868, I had demonstrated the necessity of giving to Congresses the noble mission of establishing the general rules of the law of nations, and I had maintained that all the representatives of the states, without distinction between small and great Powers, should sit in these Congresses. See Chapter XLII of the work *Principii direttivi dei congressi internazionale*, p. 272, and the important foot-note of Pradier-Fodéré on this chapter in the French translation, v. II, p. 64.

body to lend us the most effective co-operation of his intellectual powers.

This movement will be particularly favored by the increasing development of international trade and civilization. These constitute two powerful factors, which will continue to secure, strengthen and increase the same aspirations, the same sentiments, and the same ideas, as far as the common interests of mankind are concerned. Instead of a coalition of states, we shall see realized a confederation of civilized nations. All will agree in considering war a most disastrous scourge, and by the union of their forces, they will compel governments to renounce the aspirations of military greatness and to consider war as the greatest of all crimes.

As for us, we shall never lose faith in our ideal.

THE PRIMITIVE BOND OF MANKIND WAS THE FAMILY, THE FINAL BOND WILL BE THE LEGAL CONFEDERATION OF CIVILIZED NATIONS.

## CHAPTER IV

### THE AMERICAN INSTITUTE OF INTERNATIONAL LAW —JEROME INTERNOSCIA'S NEW CODE OF INTERNATIONAL LAW

32. The American Institute of International Law proposed by James Brown Scott and Alvarez, and its purpose. 33. Opinion of various European jurists as to its purpose. 34. Our opinion. 35. Internoscia's new Code of International Law and its purpose. 36. Our opinion of Internoscia's work.

32. On the initiative of the eminent publicists, Drs. James Brown Scott and Alexander Alvarez, there has been founded in America the important association known as the *American Institute of International Law*. It is a scientific association with no official character, whose aim is:

a. To contribute to the progress of international law and to cause the nations of the American continent to accept its principles;

b. To promote the scientific and methodical study of international law, to popularize its principles, to diffuse their knowledge in their application to the conduct of international relations;

c. To contribute towards a better understanding of international rights and duties, and the formation of a common sentiment of international justice among the peoples of the American continent;

d. To endeavor to bring about the universal acceptance of pacific action in the adjustment of the international relations of the nations of the American continent.

With these objects, the American Institute of International Law was created to formulate general principles of international law, to strengthen the bonds which unite the American peoples to one another in order adequately to provide for the needs of the American Republics in their reciprocal relations, as also for those of an internal character, so as to respond to the legal conscience of the civilized world. It also proposed to discuss questions of international law, especially those likely to arise among the Ameri-

can Republics, and to endeavor so far as possible to settle them in conformity with the principles generally accepted by international law; or by extending and developing such principles in response to the express or implied aspirations of the American Republics, in conformity with the essential principles of right and justice.

The two eminent American publicists then outlined the programme of their new institution and requested European jurists to express their opinion as to the advisability of the new Institute contemplated.

33. Various members of the Institute of International Law have discussed the proposed foundation at length. The discussion was initiated by an article published in the *Revue générale de droit international public* by Lapradelle, under the title: *L'Institut américain de droit international*.<sup>1</sup> Thereupon, Bar, Catellani, Dupuis, Fauchille, Lammasch, Politis, Albéric-Rolin, Weiss, Westlake and others expressed their opinions. The majority notes the difficulty arising from the very title of the new foundation, which, by assuming the name of "American," thus alters in a measure the conception of the Institute of International Law, to which ought to be assigned a *world*, rather than an European, Asiatic, or American, character. The discussion of this matter created great general interest, the more so as Dr. Alvarez (one of the founders of the new institution) relied squarely on the Monroe Doctrine and had in 1910 published a book entitled: *Le droit international américain, son fondement, sa nature*. This volume provoked the publication of the work of the Brazilian professor, Sá Vianna: *De la non-existence d'un droit international américain*, which he presented in 1912 at the Pan-American Congress. The two publications gave rise to long discussions in America and in Europe as to whether or not it could be admitted that American international law possesses a special character, different from that appertaining to universal international law. This, in fact, taken in its correct sense, would mean the law of international society, that is to say, of all peoples scattered over the world, with due regard, for its proper application, to all the historical and moral conditions of each region to which such law must be applied. The distinction between American international law and international law being

<sup>1</sup> *Revue générale de droit internat. public*, v. XIX, 1912, p. 1.

granted, hardly a person would admit the alleged distinction between American international law and European international law.

34. This is not the place to examine at length such a controversy, or to set out and discuss the opinion of the eminent jurists who expressed their views concerning the step taken by Drs. Scott and Alvarez, who stood as sponsors for the creation of the American Institute of International Law. We wish only to state our own modest opinion as to the advisability of establishing such an Institute.

No one, on principle, can deny that all men should co-operate in the great work of establishing and drawing up a common law and the rules of the association of civilized states.

This is the task of science, which best asserts itself in the scientific society where collective effort takes the place of individual endeavor. Its noble task is the development of the legal conscience of civilized peoples with respect to the rules adopted to govern the mutual relations of states, and the enunciation of the present common law. Thus it will be possible to induce national representatives to accept that law and to cause its proclamation by the collective representatives of the states assembled in a Congress.

The Institute of International Law, founded at Ghent in 1873 upon the initiative of eminent European and American jurists, was established with that humanitarian end in view. Now the great advantage which may also be derived from the contribution to the great work of the American jurists assembled as a scientific association must be generally recognized. I consider, therefore, that the foundation of the American Institute of International Law will be of great value from the point of view of the general interest.

The foundation of the new association appears to us important from another point of view. International positive law cannot become the common law of the states in union unless it is accepted and ratified by those who must recognize its compulsory legal force. Now it seems to us that the American Institute of International Law will be able to assist in demonstrating how certain rules of common law are adaptable to the historical and moral requirements of the American Republics. Thus, it will be possible to eliminate certain difficulties in bringing about the acceptance

by America of the rules of positive international law. The latter will not constitute the common law of the states and groups of states which live in a society unless they consent to recognize its authority. Hence, it is necessary that it be adapted to the historical and moral conditions and requirements of these states, in order to make their recognition less difficult.

Now it is a fact that the American Republics constituted with the sentiment of their independence have bound themselves jointly and severally to protect it. This sentiment was solemnly proclaimed by Monroe in his message of December 2, 1823, in which he asserted that no European Power would have the right to interfere with the destinies of the American Republics or with their independence. This conception was subsequently exaggerated to the point of professing to uphold their independence even in spite of international law and of laying claim to an American international law, a claim which, in an absolute sense, we cannot support.

In a measure it cannot be regarded as forbidden to a state, as a consequence of its autonomy and independence, to proclaim in its relations with other states certain rules of law. It is necessary, however, to observe that the rules thus proclaimed can only be considered as rules of public internal law. We consider that the same may be said of a group of states situated on the same continent. Such states, basing themselves on their autonomy and independence, and with a view to better meeting their historical and moral needs collectively considered, and to better safeguard the development of their common interests, may agree to proclaim in their relations with other states certain rules as their common law. It must furthermore be noted that such rules, *to be accurate*, could not have the character of international law, but rather that of interstate common law. International law properly speaking should constitute the common law of the states in any section of the world which, being in union, have recognized the compulsory legal force of the law proclaimed through their co-ordinate action. A striking example of this is found in the rules agreed upon in the last Hague Conference of 1907, in which states from all over the world participated, 44 in number, several of them from America and others from Asia.

The delegates plenipotentiary appointed to represent the several

states were unanimous in signing the various conventions, but each made some reservation to the rules approved.<sup>1</sup>

The conclusion to be drawn from the above is that the independence of the American Republics in establishing rules of international law proper may be considered as dangerous.

Unwillingness on the part of other states to recognize as common law the law proclaimed by the American states would cause a great practical drawback in the development of international law. Thus, there would follow an actual change in the conception of international law by the creation of an obstacle to the practical establishment of a legal homogeneity between the European and American states.

In order to obviate all disadvantages and prevent difficulties which may arise in practice, we deem it advisable to draw a line of distinction between international law proper and interstate law. International law would be the complement of the legal rules most likely to bring about the legal communion of all the civilized states of the world, whether European, Asiatic or American. Interstate law, on the other hand, would indicate the common and public law of the American Republics in their relations among themselves.

Now, international law proper must, in respecting interstate law, be in harmony with it. It would be necessary also to have due regard for the rules established by the American Republics as interstate law.

On the other hand, in order to contribute to the development of international law and to make it applicable to all the American Republics, the interstate law established by them should not be an obstacle to their relations with other states. This must be deemed indispensable in order to establish a legal community between the European and American states.

This would be the exalted purpose of the American Institute of International Law and the great contribution it could make to the promotion of international law and the creation of a legal community between European and American states.

Such an institution, as a scientific association without any official status, should also endeavor to bring about the acceptance of the general principles of international law proper by the American

<sup>1</sup> See *supra* for the conventions signed.

Republics and to aid as much as possible in harmonizing interstate law with the common principles of international law.

Bearing in mind this important mission, we feel sure that those who have launched the project of the new institution will know best how to organize their work so as to insure the realization of its practical aims, and we predict for it the greatest success.

35. Internoscia is one of the most recent writers on international law, and the author of the *New Code of International Law*, published in 1910 in New York in three languages—English, French and Italian.

In his introduction, the author, regarding the present law as inadequate and in need of recasting, proposes a new order of things designed to improve the internal law of nations. It is not our intention to develop the author's conception as manifested in his introduction, but to outline its fundamental points in order to show the errors of method and system.

The author plans to present a code of international law capable of regulating all possible relations between states, and of individuals with states, with a view to abolish war and to substitute armed peace. He states that "two-thirds of this Code contain what is found in books on international law, published during the last two or three generations. The rest, while it is not to be found in such books, is yet not altogether new to modern minds; in fact it is something felt by almost every heart beating in this twentieth century, something which, if expressed in one phrase, might be said to be a *longing for universal peace*." <sup>1</sup>

He affirms that "the law, as it is, is inadequate, it needs recasting; the law, as it is, is eaten by its own rust; at certain places it reaches the ideal, at others it falls short of common sense." "When I say *law*—he says—I mean the highest type of law, the law of nations, the international law which includes in itself all the other laws of mankind. . . ." <sup>2</sup> Accordingly he conceives an international law which, in his opinion, would be the law that the representatives of all the states of the world ought to proclaim in the international Congress. It is the latter's function, in his opinion, to carry out the law and to insure respect for it, with the supreme

<sup>1</sup> Internoscia, *New Code of International Law*, First ed., 1910, Introduction, p. ix.

<sup>2</sup> *Id.*, *op. cit.*, p. x.



right of appealing to international force in order to destroy a state which would refuse to comply with the law so proclaimed.<sup>1</sup> He considers that "the most important function of the international Congress is that of ordering the forcible execution of its judgments. Such an execution, when made necessary by the persistent refusal of the condemned state to comply with the international command, is nothing less than war; but if such an event ever happens, it will be because of the folly of a single state, which will still have the right to assert its independence and claim the rights of a belligerent, even in opposition to the international force." <sup>2</sup>

He arrives at this result by considering that "the ideal of peace is found in the aspiration towards a new organization of the community of states, an organization in which all the controversies between state and state must, without exception, be solved by legal means provided for that purpose, namely, an adequate body of laws, magistrates to apply them, punishments for infringers, and a regular force sufficient to inflict the punishment that any state may incur." <sup>3</sup>

He states that it would not even be decisive, as the community of states, to be organized for the legal protection of international law, must be a supreme power, designed to respect and to command respect for the independence of peoples. Hence it seems to provide a codification which represents positive international law and to institute a magistracy competent to apply that law. He looks forward, therefore, to the realization of the triumph of peace, as the outcome of a state of affairs which he thus describes: "when the codification of international law will be identically accepted by all the states, and when by the will of the whole civilized world there will exist a supreme magistrature (*sic*) constituted by all the states. Until this is done, and until war is abolished by the act of all the states and a world-wide jurisdiction is constituted, war will not change its functions and the dangers for right and for civilization will not be diminished." <sup>4</sup>

The author thus indicates his conception which prompts him

<sup>1</sup> *Internoscia, New Code of International Law*, First ed., 1910, Introduction, p. xi.

<sup>2</sup> *Id.*, *op. cit.*, p. xlv.

<sup>3</sup> *Id.*, *op. cit.*, p. xiv.

<sup>4</sup> *Id.*, *op. cit.*, p. xv.

to request the co-operation of thought and action united for a common purpose.

Proceeding along these lines, Internoscia has presented to the public a complete code containing 5657 articles, the most extensive code that has ever been written. For that reason, he declares that two-thirds of it contains what is found in books on international law, and he does not cite any of the writers whose theories he has accepted. In order, however, to prevent any criticism, he announces that he will name the authors upon whom he has drawn and whose works were published in French, English and Italian.<sup>1</sup>

36. Without attempting to examine what the author planned to do, we shall merely say that the whole work can be divided into two parts. In the first part, which, as he states, represents two-thirds of the book, he gives what is found in the works on international law published during the last two or three generations; in the second part, he endeavors to explain how the longing for universal peace can be realized.

Among the writers whose opinions the author has freely and *literally* quoted, it must be stated that in public law he has textually reproduced several of the rules codified by us; thus, for example, articles 2, 3, 71, 72, 360, 368, 369, 371, 394, 1069, 1071, 1077, 1078, 1090, 1163, 1172, 1173, 1419, 1420, 1421, 1422, 1414, 1415, etc. of Internoscia correspond to the articles in Fiore (*Diritto internazionale codificato*, 1909) numbered 40, note to rule 54, 389, 392, 983, 978, 963, 953, 275, 543, 545, 611, 613, 396, 643, 649-652, 653, 1175, 1176, 1178, 1179, 1182, 1185, etc.

In private international law, also, he sums up principles set forth by us, as, for example, articles 1976, 1979, 1981, 1984, 1990, etc., which correspond to articles 1044, 1048, 1053, 1057, etc., of Fiore (*Diritto internazionale privato*, 1901, vol. III).

Desiring to express my opinion of Internoscia's work, I shall merely say that the account he gives of the principles advocated by writers for settling international questions constitutes the best part of his work and testifies to the author's extensive study. The means that he recommends for the abolition of war and for providing all mankind with a legal organization, without making

<sup>1</sup> Internoscia, *New Code of International Law*, First ed., 1910, Introduction, pp. viii-ix.

any allowance for the various gradations that exist between the different states of the world, make his work a vain and useless labor. For an equality of legal condition among the states of the various regions of the world is not admissible unless the fact is recognized that a difference exists between them, determined by circumstances, culture and civilization,—circumstances which especially distinguish the actual condition in which the natives of Asia and Africa are found, as compared to the civilized peoples of the other parts of the world. Nor can the constitution of a Congress be effectuated which would have the authority and the means of subjecting all the inhabitants of the world to its high authority; nor is it conceivable that it could have the authority to order the use of coercive measures against whatsoever agglomeration of peoples declined to accept its decisions.

The writer finally asserts that the said Congress may order the dissolution of a state which does not submit to its authority and that it may compel it to do so by force, using for this purpose the coercive means of war.

Without going any further, our conclusion is that the writer, for the purpose of furnishing a legal organization to the whole international society, planned an unsound and unpracticable undertaking.

## CHAPTER V

### PURPOSE OF THE PRESENT WORK—SOURCES OF THE LEGAL RULES FORMULATED THEREIN—DIVISION OF THE SUBJECT

37. Purpose of this treatise. 38. Explanation of its title. 39. Practical efficacy of scientific law. 40. Sources of our codified rules. 41. Importance of popular legal convictions. 42. Authors and historical law. 43. Divisions of the present work.

37. From the ideas developed in the foregoing chapters, it follows that international law constitutes a branch of the whole sphere of law, still in its period of elaboration. Therefore, those wishing to discuss it cannot confine themselves to a doctrinal exposition of the existing law, as in the case of civil and commercial law and of other branches of positive law, composed of a collection of codified laws. It has already been observed that the rules of international law which at the present time have the authority of positive law are few and are wanting in a true legal sanction.

The scholar is naturally obliged to consider the future as well as the present, and must take reason and induction as a guide of his observations in order to complete and perfect the existing law and to prepare its progressive elaboration. The ultimate purpose, in fact, is to bring about a systematic drafting of the body of rules which ought to constitute the common law of civilized countries and serve to bring to realization the legal organization of society.

Accordingly, we purpose to set forth international law, taking into account the existing law and such rules as may be capable of becoming law. In other words, we intend systematically to formulate the body of rules which consist in part of those accepted by states in general treaties, in their legislation or in diplomatic documents, and in part of those rules found either in the popular convictions which have manifested themselves in our time, or in the common thought of scholars and the most learned jurists. As a natural consequence, the rules systematically assembled in the present volume represent in part present international law, and in

part the international law of the future. As a whole, it comprises the system which, in our opinion is calculated to endow international society with a legal organization.

38. We are presenting this body of rules, based on historical, scientific and rational law, under the title of *International Law Codified*.

This very title indicates that it does not deal with a body of legal rules having the same authority as those collected in a code of positive law, for in that case the work would have been entitled *Code of International Law*. On the contrary, it was our wish to follow the example first given by the Genoese jurist Paroldo,<sup>1</sup> and at a later period, by Petrushevez,<sup>2</sup> Bluntschli,<sup>3</sup> Field,<sup>4</sup> and others, and we have purposed to set forth, in the form of a code, the rules of international law, with a view, primarily, to present to the public a system as methodical and complete as possible.

Neither should it be supposed that international law codified, as we present it, is to be considered as a project of an international code proposed to governments to be adopted by them in its entirety. We are, nevertheless, convinced that sometime the international society will bring to realization Mirabeau's prophetic phrase: "*Le droit sera un jour le souverain du monde.*" But to imagine that governments could all immediately agree upon a complete and codified body of rules would be to hope for the realization of a fanciful and untimely enterprise.

It is our firm belief that, in the international society, force will cease to exercise absolute preponderance, and will be replaced by the authority of law. But we also believe that this end will be better attained by proceeding cautiously and being guided by favorable circumstances. It would be an exaggeration to conceive the idea of codifying international law in its entirety. It will be possible indeed to effectuate the codification of such matters on which common legal convictions have been formed, and to wait until civilization, progress and the community of commercial relations make possible the codification of new subjects of common international interest. Every new step will be a conquest tending

<sup>1</sup> *Saggio di codificazione del Diritto internazionale.*

<sup>2</sup> *Précis d'un code de droit international.*

<sup>3</sup> *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt, mit Erläuterungen. Droit international codifié translated by Lardy.*

<sup>4</sup> *Outlines of an international code, 2d edition.*

to assure the sovereignty of law in the world; but it will be necessary to wait until the precious fruit is ripe, and it will always be necessary to proceed gradually.

Now that we have disposed of ambiguities and explained the title given to this book, we may say that we have tried to explain in the notes which rules have the authority of positive law and which the force of scientific law. For it must be said that the rules evolved by scholars cannot possibly have the same compulsory legal force as those proclaimed by the authorities qualified to lay down the positive rules of the relations existing amongst the subjects belonging to international society. Such rules have, however, the authority which must be assigned to the general principles of law whenever no rule of positive law has been enunciated either by the competent organs of the state or by plenipotentiaries in a treaty and rendered compulsory amongst states by reciprocal consent. Rules derived from the concurrence of opinion among the foremost publicists on a particular principle acquire, therefore, an effective authority, even with governments. For it cannot be denied that when the most qualified publicists of different countries are in accord upon proposing a legal rule, that circumstance must militate strongly in favor of the legitimacy of the principle. The result is that rules elaborated by jurists, though actually lacking the force of positive law for want of governmental consent, have nevertheless a great value, since governments cannot fail to consider them as the most exact expression of the legal sentiment of our time, and cannot disregard their reciprocal obligation to apply them in their mutual relations.<sup>1</sup>

39. We must note that the practical authority of scientific law is greater in proportion as the domain of positive law is smaller. Even when positive laws are codified, the legal principles derived from scientific law exercise their authority whenever there is no positive law to govern and the omission cannot be supplied by the application of legal rules provided to govern similar or analogous cases.

The legislators of all countries recognize that no system of

<sup>1</sup> *Solent autem gentium sententiæ de eo quod inter illas justem esse debet triplici modo manifestari, moribus scilicet et usu, pactio et fœderibus, et tacita approbatione juris regularum a prudentibus, ex ipsis rerum causis per interpretationem et per rationem deductarum.* Warkönig, *Doctrina jurisphilosophica*, No. 146.

positive law can be so complete and perfect as to comprise all the rules intended to apply to all cases and to settle all disputes. They admit, therefore, that, all difficulties having to be settled by judges, the latter, in the absence of a rule of law applicable to the case submitted to them or of a rule covering similar or analogous cases, must decide according to the principles of law. Now, it is generally recognized that the general principles of law are indeed those laid down by jurists who, at various periods, expound the legal thought of their day on current matters and lay down rules responding to the exigencies of real life.

Consequently, principles of scientific law always have their practical authority and efficacy, even when positive and concrete legal rules are codified, whenever a particular case cannot be decided by applying the rules formulated by legislators. The practical value of such principles is always certain for the reason that a judge can never refuse to pass upon a case under pretense of the non-existence or insufficiency of the law, inasmuch as the state imposes upon him the duty of deciding every case.

As a consequence, the authority of scientific law being greater in proportion to the deficiencies of positive law, its authority in international law must be very great, since positive law, so to speak, is conspicuously absent.

40. We shall now indicate the sources from which we have drawn our legal rules.

The main source is found in general conventions. These are not very numerous, but their number is constantly increasing; they constitute the best source of positive law because they represent the uniform law accepted, by reciprocal agreement, by the parties who have signed or given their adhesion to these conventions.

We have, furthermore, ascribed great importance to the proceedings of congresses, and especially to the declarations of the representatives of governments in the protocols relating to general conventions, as such declarations must be considered as expressing the common views of the governments represented. Even when certain rules have not the character of law and of positive law by virtue of the consent of the governments represented, one must, nevertheless, consider as very important the authority arising from the accord existing in the wording of a draft agreement

accepted by a large number of plenipotentiaries meeting to agree upon questions of common law, although the draft itself is subject to the approval of their respective governments. Even though the rules so formulated assuredly cannot by that fact acquire legal force, they must, nevertheless, have great authority as expressing the views of the representatives of states upon rules which in their opinion, ought to be adopted as law.

In this category fall, for example, the rules adopted at the Conference of Brussels of August 27th, 1874, on the laws and usages of war. The draft presented to that Conference, convened at the suggestion of Russia, was drawn up after a long discussion, and although not finally approved and made compulsory, it has, nevertheless, a great value. For one cannot deny that, as governments saw the need of laying down in common accord concrete and positive legal rules concerning their relations in time of war in order to lessen so far as possible the injuries which war causes to neutral states and to the non-combatant citizens of the belligerent states, and as they had met in Conference for such a purpose,—one must assign a considerable value to the rules adopted by the plenipotentiaries in the form of a draft, subject to the final approval of their respective governments.

Particular treaties, that is, those concluded between two or more states for the purpose of regulating their special interests, can be considered as formulating legal rules binding only upon the states concerned.

It must, however, be observed that so far as certain matters are concerned, particular treaties may be considered as valuable sources of legal rules for common international law, which may be authoritative with respect to other states, although they may not yet have received the general approval of those states, or been accepted as rules of positive and concrete law through the reciprocal agreement of such states. This point must be explained. Special treaties may represent all the positive and binding rules concluded between states entering into them, which rules must be considered reciprocally binding by reason of their assent. It must, however, be observed that, especially in the particular treaties concluded since 1856 on matters of common interest, a certain uniformity of principles is found. Now it seems to us that such uniformity must have great authority in assigning to these



principles the character of common law for all the states having the same degree of civilization.

This may be said, for example, of certain uniform rules relating to the rights of consuls, the extradition of offenders and the protection of trade or commercial marks. It cannot be contended that the legal rules contained in the majority of particular treaties have the force of positive law, not only between the parties which have concluded them, but also with respect to others. Nevertheless, particular treaties may be considered a source of common international law, for it seems to us that a uniformity in treaties must be deemed an indirect recognition of the common law of civilized states; and while, therefore, such uniform law, embodied in particular treaties, has not, strictly speaking, the true authority of common law, yet it represents what with little difficulty may be said to be an approximation to a collective declaration on the subjects under consideration.

We have also taken into account the municipal legislation of civilized countries, because from it international law may be deduced, especially when it regulates international relations in a uniform manner. This point, indeed, must be clearly understood in order to avoid ambiguities. The law proclaimed by a sovereign is only binding on his subjects. Although a national legislature may codify the principles of public or private international law, the law thus promulgated retains none the less its proper character as the municipal law of a particular state, or of civil law, in the sense given to that word by Roman jurists, *jus quod quisque populus ipse sibi constituit et proprium ipsius civitatis est, quod vocatur JUS CIVILE quia quasi jus proprium ipsius civitatis*.<sup>1</sup>

Thus, for example, in Italy, many rules of international law governing war are found in the field regulations of the Italian army.<sup>2</sup>

Other analogous provisions are found in Italy in the military penal code and in the merchant marine code. The latter contains a section relating to maritime law in time of war, in which the legitimate acts of war, the treatment of neutral ships and merchandise, and the duties of neutrality are laid down and the articles constituting contraband of war enumerated.

In the legislation of other civilized countries, provisions are also

<sup>1</sup> L. 9, Dig., *De justitia et jure*, 1, i.

<sup>2</sup> See these regulations, approved by royal decree of November 26, 1882.

to be found regulating certain matters of international law. Thus, in the United States, the Instructions for the Government of the Armies in the Field, published in 1863, comprise a complete body of international rules in time of war. We need not refer to the special rules issued by France, and the regulations of Russia.

Attention must again be called to the fact that the municipal laws of the different states cannot have any force beyond their own territory and their own citizens. It must be said, however, that, just as the concurrence of jurists contributes to give authoritative weight to the principles they recognize, so the concurrence of a great many legislatures with regard to certain rules of international law contributes largely to impose such rules upon the civilized world.

In order to make this proposition clear, we may recall the uniformity of the municipal legislation of civilized states concerning the legal status of foreigners and the acquirement of civil rights properly so called, namely, the inviolability of personal property, right of choosing one's nationality and of expatriation without the previous consent of the government.

We have also considered as a source of the rules of international law, the acts of governments in their diplomatic relations. Although it is quite evident that, strictly speaking, the unquestioned and unreserved acceptance by governments of certain principles of international law, solemnly proclaimed in diplomatic acts, cannot accord to these principles the authority of positive law, nevertheless the enunciation of these principles by one nation and their tacit acceptance by another must give them great authority in both countries.

This is true especially with regard to the principles involved in the Roman question, explained in a circular communication of the Italian government in 1870 after the annexation by Italy of the Papal States. In that note the right of the Romans was proclaimed to avail themselves of their natural liberty to join the Kingdom of Italy, and the respect due to their will solemnly expressed by a plebiscite.

This principle having been generally accepted must be deemed a rule of international law. One must accordingly exclude as contrary to modern public law the inaccurate principle advanced by the partisans of the Papacy that, in order to protect the pretended interests of that institution, the Pope should have been left

to his temporal domain, and, contrary to common law, all political liberty have been refused to the Romans.

This must also be said of the affirmation of the principles made successively by the French and Italian governments in the matter of the abolition of extra-territorial rights at Massouah and Tunis.

We have likewise stated the importance of the custom by which, as a consequence of tacit consent, the reciprocal and uniform observance of the same rule of law gives it the same authority as a rule established by express consent.

In all periods custom has been considered as one of the factors of positive law. In the absence of a positive and concrete rule in a matter of law, it has been considered reasonable that the matter be governed by the rule derived from common practice. This principle has been set forth by Albericus Gentilis in his renowned work on the law of war, in which, studying the sources from which to derive the rules of justice to be observed during hostilities, he said: "Though one ought not to judge according to precedent, conformably to a very wise law of Justinian, nevertheless it is a fact that precedents open the way to probable conclusions and that when in doubt, precedents and custom ought to furnish a guide. It is certainly not expedient to change what has become certain and constant by continuous observance."<sup>1</sup>

Grotius has likewise held that custom among states ought to be considered as law. "*Non negamus, says he, more vim pacti accipere.*"<sup>2</sup>

41. We have, besides, attributed great importance to legal convictions which, owing to the constant progress of civilization, have progressively taken form and developed within the conscience of civilized peoples.

It is a fact which no one would deny that the community of interests among the inhabitants of the different countries, which has resulted from the development of international trade and civilization, and the community of their ideas as to the conditions required for the legal organization of international society, have caused the formation in all civilized countries of certain uniform convictions as regards the legal rules applicable to international

<sup>1</sup> Albericus Gentilis, *De jure belli*, chap. I, Book I, no. 6, translated into Italian by Fiorini.

<sup>2</sup> Lib. II, cap. V, no. 24.

society. These convictions no doubt, are neither proclaimed nor established through an agency qualified to formulate them; but they assert themselves under the form of a popular sentiment which expresses the public conscience, which comprises and claims the observance of certain principles indispensable for the common life of nations and for the protection of everyone's rights in international society.

These principles have not been solemnly sanctioned like those recognized by governments in treaties or enunciated by them in diplomatic acts. Nevertheless, they exercise a great authority, having its origin in the mysterious and unquestionable force of public opinion which compels governments to observe principles of justice in exact conformity with historical and moral requirements and which is inspired by reason and universal conscience.

In order to be convinced of this fact, it is merely necessary to read the history of diplomacy and to take account of the acceptance by governments of certain principles which have been dictated by public opinion, and to refer to Chapter I of the present work. We shall here merely reiterate that popular legal convictions ought to be the most certain source of international law. We have taken it into very considerable account, because the rules which are in the common conscience of nations in intercourse with one another must be considered as the most exact expression of certain moral needs and of the principles of social justice which have developed with the progress of civilization.

Publicists engaged in determining the legal rules of international relations should therefore direct their special attention toward the general popular feeling concerning these relations, a feeling which reflects public opinion. Public opinion is formed through the communications maintained by the press and telegraph between the inhabitants of the various parts of the world. It is the final result of the development of uniform thoughts and sentiments on every event which takes place in both hemispheres, on reciprocal needs and interests and on the common requirements of the international relations of states. Public opinion does not now exercise its full influence on international life, because it has not yet acquired its full force and is not yet properly represented. But we feel sure that in time it will become the most fruitful source of legal rules, which will have to be admitted by governments in the con-

duct of international relations. In proportion as public opinion becomes enlightened, more developed and united, it will acquire greater authority.<sup>1</sup>

42. The most important source of the subject-matter of the body of rules we have systematically collected in this volume, lies in the uniform views of the best qualified authors on the legal rules of international relations in keeping with the present and positive needs of international society. We have laid under contribution the works of all the jurists who have studied international law, and we could not truthfully state which have contributed the most to formulate our convictions.

We have especially studied the works of Phillimore,<sup>2</sup> Calvo,<sup>3</sup> Heffter,<sup>4</sup> Wheaton,<sup>5</sup> Pradier-Fodéré,<sup>6</sup> Lawrence,<sup>7</sup> Bluntschli,<sup>8</sup> Field,<sup>9</sup> Woolsey,<sup>10</sup> Halleck,<sup>11</sup> Hall,<sup>12</sup> Rivier,<sup>13</sup> and Oppenheim.<sup>14</sup>

<sup>1</sup> We have always considered public opinion, developed and enlightened by civilization, as the principal factor in the reform of international law.

On page 347 of our work published in 1865, we said: "We believe that, without creating an armed tribunal, the most effective guaranty must be public opinion; it must be, in our judgment, the aegis and guaranty of right, it is the best and most impartial of courts. We do not advocate material constraint among nations, but moral constraint, and the latter we cannot conceive otherwise than in the mysterious power of public opinion, a power, however, undervalued because it has not yet shown its full force, but which will prove itself strong and all-powerful when it becomes fully conscious of its rights."

Proceeding with our argument to oppose the idea of a proposed confederation, we concluded by extolling the power of public opinion, expressing the idea as follows: "Just as the principles of justice which regulate the relations of persons in private society, when made clear to social conscience and to public opinion govern civil societies, so the principles of justice which must regulate international relations once they are clear to national consciences and public opinion, will regulate and govern international society."

<sup>2</sup> *International Law*, 2d ed., 1874.

<sup>3</sup> *Le droit international théorique et pratique*, 1872.

<sup>4</sup> *Das europäische Völkerrecht der Gegenwart*, translated by Bergson, 1873.

<sup>5</sup> *Elements of international law*, New York, 1836. *Droit des gens mis au courant des progrès du droit public moderne*, trans. by Pradier-Fodéré, 1863.

<sup>6</sup> *Traité de droit international public européen et américain*, 1885-1894.

<sup>7</sup> *Commentaire sur les éléments du droit international et sur l'histoire des progrès du droit des gens*, de Wheaton, Leipzig, 1868-1873.

<sup>8</sup> *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt mit Erläuterungen*, translated by Lardy.

<sup>9</sup> *Outlines of an international code*, New York, 1876.

<sup>10</sup> *Introduction to the study of international law*, New York, 1875.

<sup>11</sup> *International law*, San Francisco, 1861.

<sup>12</sup> *International law*, Oxford, 2d ed., 1886.

<sup>13</sup> *Principes du droit des gens*. 1896.

<sup>14</sup> *International law*, v. 2, 2d ed.

We have given to legal history a limited space. We cannot, indeed, draw much from that source, for legal history has often represented occurrences which were due to the abnormal conditions in which international society was placed as a result of the tyrannical preponderance of politics, and at times has been the accepted result arising from necessities of fact at a critical period in the life of peoples.

As our purpose has been to frame a system of rules designed to eliminate all arbitrariness and to give a legal organization to the society of states, it was essential not to consider legal history as a trustworthy source. In fact, in the history of international relations, many principles are accepted which are opposed to rational law, and not only is it useless to translate the fact into law, but it is well always to bear in mind the rule of the Roman jurist Paul: "*Quod vero contra rationem juris receptum est non est producendum ad consequentiam.*"<sup>1</sup>

43. For the division of the subject-matter of this work, we have been guided by the following principles:

In order to proceed systematically, it was necessary in the first place to determine in a general way the concept of the law which must govern any kind of relation which may arise and develop in international society, and to fix that law; to establish the basis of its authority; to distinguish the various forms this law may assume; to establish the limit and extent of its domain; and to state precisely its legal protection. These matters are the aim of the rules collected in the preliminary part under the title of *Fundamental Principles*.

Having determined and specified the concept of international law, we have divided the remainder of the work into four books, as follows:

Book One:—Persons and things subject to international law.

Book Two:—International obligations.

Book Three:—Property as an object of international law.

Book Four:—Sanctions of international law.

In *Book one*, it has been our purpose to determine who or what must be considered subject to the authority of international law, the *subjectum juris*. We have determined the concept of the person and specified what must be considered as a person. Yet, as there

<sup>1</sup> L. 48, Dig., *De Legibus*, I. 3.

are in international society besides persons properly so called, entities which, while unable to assume the condition of international persons, must nevertheless, in their relations and actions, be subject to the rules of law which must govern international society, we have sought to determine their rights and the legal rules governing them.

Inasmuch as the theory of rights must always be complemented by the theory of duties, we have, after having determined the rights of the state and pointed out the rules which should govern the acquisition and exercise of these rights, sought to establish the duties of states in their reciprocal relations.

The same principle has been followed with regard to the individual and the Church, whose rights and duties we have defined, and the means of whose legal protection we have established.

*Book two* refers to international obligations, which arise principally from treaties. Consequently, this book is mainly composed of matters relating to general and special treaties. In it we have also laid down the rules which apply to obligations arising in the absence of agreement.

*Book three* refers to things and property in their relations with international law. In it we deal with common and public things, territory, state property and private property.

*Book four* comprises the fundamental principles which must govern the enunciation and legal protection of international law. As regards such protection, we set forth the principles applicable to the settlement of disputes between states and to the prevention of such disputes and in addition, we point out the coercive measures legitimate in time of peace to restore to violated law its authority.

Finally, we treat of war as an extreme measure of legal protection and we lay down the rules regarding its lawfulness, the rights and duties arising out of it for belligerents and neutrals, and we discuss the exercise of the rights of war and the proper methods of settling the difficulties which may arise out of the exercise of these rights.

## FUNDAMENTAL PRINCIPLES

### INTERNATIONAL LAW AS A SCIENCE

1. International law is a body of rules designed to determine, govern and protect the rights and duties of states, and the rights and duties of individuals and juristic persons in their relations with states, and among themselves whenever these relations affect or are likely to affect the international society.

*International law*, in its exact literal sense, would signify the law which concerns the relations between two or more nations. Thus, the term does not quite correspond with the idea it is designed to convey. The expression *Inter-state law* could not, however, be substituted for it, as it would only indicate the law concerning the relations between two or more states; neither would the expressions *Law of Nations*, *Law of Humanity* or *Public External law* be acceptable. The most appropriate name for such a law would be the Law of Mankind, which is the collective term, comprising all beings united with one another by a common bond and constituting mankind. We prefer, nevertheless, to accept the term *international law* sanctioned by tradition.

2. International law may be viewed either as rational or positive.

#### RATIONAL LAW

3. Rational international law is the body of legal rules which the human mind perceives, infers or deduces from the principles of natural justice so far as they govern the relations existing between the persons and beings existing in the *Magna civitas*, taking into account their condition and status and their historical and moral exigencies.

The principles of natural justice exist in the conscience of the people and develop gradually with civilization. Reason understands and conceives them as the rules of the harmonious development of each relation, taking into account the nature of the relation itself and the historical and moral exigencies of those to whom it must be applied. Positive law commenced to exist as a rational precept or principle of natural justice before assuming the form of law.

The same was true of international law. The rational principles governing international society, before they became legal rules and were accepted by states as rules of positive law, followed the law of gradual development and evolution. Governments have not, as a matter of fact, wholly ignored the binding force of the principles of the rational law of nations.

In 1753, the British Government in an answer to a note of the Prussian



Government, said: "The law of nations is founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage." Phillimore, v. I, chap. III, § 20. See the note of Great Britain to Russia in 1780 and the circular note of the Russian government to the allied Powers in Fiore's *Diritto internazionale pubblico*, v. I, 4th ed., § 179. Cf. Bluntschli, *Le Droit international codifié*, Introduction and rule 3; Calvo, *Droit international*, v. I, Principes; Renault, *Introduction à l'étude du droit international*, §§ 1-19.

Wheaton, *International law*, chap. I, § 11, defines international law as consisting of "those rules of conduct which reason deduces as consonant to justice from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent."

If the precepts of natural justice were not to exercise any authority over the conduct of states, it would result rather absurdly in excluding the legal community uniting them in cases where the rules of their conduct are not fixed by treaty.

4. Any rule will be considered as conforming with the principles of rational law which is admitted by philosophers, scientists, publicists, statesmen or by governments in their diplomatic acts, and especially those concerning which popular legal convictions have been formed.

The basis of this rule is the idea expressed by Albericus Gentilis, that true philosophers and scientists are accustomed to reason according to natural law (*De jure belli*, lib. I, cap. I, § 5). That rule was later accepted in a broader sense by Grotius, who based the rules of the law of nations on the universal agreement of philosophers, historians, poets and orators.

Vico considered popular legal convictions as the principal source of the law of nations. He said in effect: "As a result of the union of several nations of different language in common thought, by reason of wars, alliances or trade, the natural law of mankind is the outgrowth of uniform ideas among all nations on the needs and utility of each of them." See his pamphlet entitled *Principii di una scienza nuova intorno alla natura delle nazioni, per le quali si ritrovano altri principii del diritto naturale delle genti* (Edition of 12 folios printed at Naples by Felice Mosca in 1725).

#### POSITIVE LAW

5. Positive international law is the law expressly established by the common will of states entering into certain relations, these states having agreed, expressly or tacitly, to subject these relations to certain legal rules which have been duly ratified in accordance with municipal constitutional law.

6. The law established by custom, resulting from the constant and unequivocal observance by two or more states of a certain

rule concerning matters of common interest, constitutes a part of positive law.

7. A rule established by a state by unilateral act, which relates to questions of international interest, must in like manner be considered as a rule of positive international law. *Cf.* rule 30.

Any state may lay down by unilateral act certain rules of international law, which have authority as municipal law and an imperative value so long as they are in force. These rules constitute part of positive international law, since so long as they are not legally abrogated, they must be applied in the cases they contemplate. The sovereign state which enacted them is always at liberty, however, to abrogate them.

There are numerous examples of rules of positive international law established by unilateral act.

Some of the rules appearing in the draft of the laws of war proposed by the Conference of Brussels have been accepted by various states by unilateral act, that is to say, by the service regulations in time of war binding upon their own armies.

The inviolability of private property during maritime war is recognized, subject to reciprocity, by the Italian law in article 211 of the Code of the merchant marine, which reads as follows: "The capture and seizure of merchant ships of a hostile nation by the war vessels of the state shall be abolished, subject to reciprocity, by the enemy nation, to the national merchant marine."

8. International positive law is divided into *common* and *particular* or special law.

#### COMMON POSITIVE LAW

9. Common positive law consists of the legal rules solemnly formulated by the states assembled in congress or conference by means of general treaties, by which they have expressly agreed to consider the rules established as the law governing certain specific relations and matters, provided, however, that the treaties in question are duly ratified.

States cannot be subject to any one exercising over them the authority of a legislator. The principle of legal equality is absolutely opposed to the doctrine that any one of them may dictate the law to the others. Therefore, it is for the states to formulate and fix in common accord, the rules governing their reciprocal relations and to recognize the binding force of these rules, which acquire the authority of law for the ratifying states by virtue of the *consensus gentium*. The common international law consecrated by general treaties concluded by a considerable number of states is constantly growing.

We may mention among others the international convention for the protection of industrial property of March 20, 1883; the treaty for the development of commerce and civilization in Africa, of February 26, 1885; the convention

for the protection of literary and artistic property, of September 9, 1887; the convention for the free navigation of the Suez Canal, of October 29, 1888; the general anti-slavery act of July 2, 1890; and the regulations to avoid collisions at sea, of December 13, 1896. We shall refrain from citing other conventions relating to transportation by rail, health regulations, and land and naval warfare. (First Hague Conference of 1899.)

10. The rules of common law established by means of treaties have the force of law for the signatory and adhering states from the date of ratification and adhesion respectively.

#### PARTICULAR POSITIVE LAW

11. Particular positive law is the body of rules established between two or more states by a treaty concluded and ratified on matters of their own particular interest. The same effect may be attained through the constant and reciprocal observance of a certain legal rule.

#### RULES ACCORDING TO THE "COMITAS GENTIUM"

12. A rule may be considered as based on the *comitas gentium*, if it cannot be considered as established in accordance with positive international law, or based on the principles of natural or rational justice, but is founded on certain usages conforming with the reciprocal convenience of states and on their friendly relations, when these usages are not in conflict with positive international law.

The rules of the *comitas gentium* are the only ones which must be considered as based on international courtesy. They tend to strengthen the relations of friendship and good will and are inspired by practical utility and political considerations. Such are, for instance, the rules observed on the occasion of the visit of sovereigns and reception of diplomatic agents. The same is true of the usages established in consequence of civilisation. The observance of the rules of *comitas gentium* may be considered as a moral duty among states. These rules, however, are different from those which may be considered as based on moral precepts.

13. Any state which, *ob comitatem*, has voluntarily observed certain rules of conduct towards another state, may request the latter to put in practice the rule of reciprocity under the same circumstances, but cannot lay claim to a perfect right in that respect.

## RULES BASED ON MORAL PRECEPTS

14. The observance of every provision which may be considered as based upon moral law may be deemed obligatory upon states, but the execution of these provisions must be considered as a moral obligation.

15. States should be disposed to assist one another; to act reciprocally with kindness; to co-operate in the protection of general interests whenever it can be done without causing any direct or indirect injury to national prosperity.

16. It is the duty of civilized states to spread civilization among barbarous and uncivilized peoples by every lawful means, but without violating the rules of international law.

These rules tend to establish the authority of moral law in the relations of international life. We believe that the precept of Ulpian, *honeste vivere*, which indicates morality as the supreme principle of life and tends to bring to realization the most perfect development of every activity, should be applied among states as well as among individuals. We recognize, however, that it will be many years before the international life of states achieves that desirable result. So long as utility and egoistic interest prevail in international politics, and every noble sentiment of humanity is subordinated to these motives, it will be very difficult to bring about the reign of moral principles.

Nevertheless, the countries enjoying the advantages of a superior civilization do not wholly disregard the authority of moral precepts. The measures already adopted toward the abolition of slavery, the repression of the slave trade, the civilization of Africa, the assistance and care of the wounded in time of war, the prevention of contagious diseases, are consequences of the realization of the moral duties which have inspired them, so as gradually to transform these duties into legal obligations. The domain of moral duties will always be more extensive than that of legal duties; for, as Bentham has said, law will always have the same center as morals, but can never have the same circumference (*Traité de législation civile et pénale*, v. I, ch. XII, p. 93). Hence it follows that there will always exist among states, in addition to legal duties, moral duties. *Non omne quod licet honestum est*. It will be for civilization to make evident the precepts of international morals and for the most progressive states to recognize their binding force. Cf. the rules of title IX, book I.

## BINDING FORCE OF RATIONAL LAW

17. The rules of rational law have the same binding force as the principles of rational justice.

18. Any state which intends not to disregard the imperative force of the precepts of rational justice, must be considered as bound to observe them in its relations with other states.

19. Above all, it is incumbent on a civilized state always to consider as binding, in regard to any fact or relation affecting international society, the rule most conformable to the rational principles of international law, with due regard to the circumstances, which must be carefully ascertained and considered.

The two preceding rules are designed to eliminate the erroneous idea that whatever cannot be considered as established by solemn agreements contracted by states, under the stipulations of treaties or otherwise, may be deemed within the domain of their freedom of action, and that, consequently, any one may or may not comply with the rules of justice, and that the spontaneous observance of such rules must be considered as an act of courtesy, *ob comitatem*.

Certain authors have based upon this inaccurate notion the contention that, in the absence of a general or special treaty, which is no doubt the most perfect legal title from which to derive the reciprocal legal right and duty to require the observance of stipulated rules, each state may or may not, as it chooses, respect international law, and that the respect of that law must be considered as suggested by the *comitas gentium*.

See, to that effect, Foelix, *Traité de droit international privé*, chap. III, nos. 9, 11, v. I; Travers Twiss, *The law of nations*, Part I, chap. I, § 13.

We believe that among states, the perfect duty is that which corresponds to the right of one state to require the other to give, to do or to perform that which it has agreed to give, do or perform. Nevertheless, we cannot admit that, in the absence of the perfect obligation arising from treaties, everything may be considered as within the domain of liberty of action, and that respect for the precepts of rational justice may not be obligatory, but optional, and constitutes an act of mere courtesy. We believe, on the contrary, that it is incumbent on states to acknowledge the requirements of rational justice, and that the observance of these principles, far from being an act of courtesy, is the performance of a natural duty. These principles have in some degree been recognised by the five great European Powers at the Congress of Aix-la-Chapelle, in the declaration of November 15, 1818, which reads: "The sovereigns, in forming this august union, have considered as a fundamental basis their invariable resolution never to depart, either among themselves or in their relations with other states, from the most rigid observance of the principles of the law of nations, principles which, being applied to a permanent state of peace, can alone guarantee effectively the independence of each government and the stability of the general association."

#### RATIFICATION

20. Ratification is the approval or confirmation of what has been done or promised, executed in an authentic and official manner by the government of each country, according to the constitution. It is required for international acts and treaties.

21. The right to ratify, in monarchies, resides in the ruler, either alone or with the concurrence of delegates from the national

representative assemblies; in republics, it resides in the chief executive, with the direct or indirect concurrence of one of the great branches of the government, determined by the constitution.

22. Ratification must relate, as a rule, to the act as a whole as drawn up and signed by the states' plenipotentiaries and cannot contain any reservation. It must be made by each of the contracting parties and must reproduce, word for word, the act which it is intended to ratify. The parties, however, may follow by common agreement a different course. Each may limit itself to transcribing the title, the preamble, the first and the last articles of the treaty, the date of the signature and the names of the signatory plenipotentiaries, affixing the ratification, however, without reservation.

23. The ratification, signed by the persons necessary for its validity, is effective only when the exchange takes place between the contracting parties. Such exchange does not require sovereign full powers; it may be entrusted to a delegate of each of the governments concerned or to the diplomatic agent accredited to the country. It is only after such formal act has been complied with and duly recorded, that the treaty becomes fully operative and that the term assigned for its duration commences.

24. Refusal to ratify on the part of one of the contracting parties implies, *per se*, with respect to such party, the annulment of the treaty signed by its representative.

#### BINDING FORCE OF POSITIVE LAW

25. The rules of positive common law established by general treaty have the authority of law for the states which signed and ratified them, as well as for states legally adhering thereto.

26. None of the parties which have signed and ratified a general treaty may avoid the obligation to observe the rules therein sanctioned, nor at will modify its scope, as no modification is valid except by consent of all the contracting parties.

This maxim is based on the idea that the solemn recognition of a legal rule by civilized states, which have established it by common agreement and recorded it later in a protocol or treaty subscribed and ratified by them, or to which they subsequently adhered, must clothe such rule with the authority of law, and place it under the protection of the states which have proclaimed and ratified it. A state which, after having recognized the authority of a certain

law, afterwards ceases to observe it with regard to any one of the signatory states, not only infringes upon the right of the state to whose detriment the violation has occurred, but is contrary to the right of all the signatory parties, because the obligation to respect a certain rule must be considered as having been undertaken toward all the contracting parties.

The aforesaid maxim on the obligatory force of general treaties was formulated in the declaration made by the delegates to the London Conference of January 17, 1871.

See also the rules on the legal protection of "common" law, rule 47 *et seq.*; the speech of Cobden, v. II, p. 300, and Fiore, *Dir. internazionale pubblico*, v. 1, 4th ed., §§ 570-72.

**27.** The rules of positive law established in a treaty must be deemed obligatory upon the parties ratifying or adhering to it, until the treaty is solemnly abrogated.

If, however, in the treaty proper, it is expressly stipulated that each party has the power, on its own part, to release itself from the binding force of the treaty by a declaration duly notified to the other parties, its binding force would cease for the declaring state from the day such declaration was duly and legally notified.

**28.** The rules of particular positive law shall be binding between the states which subscribe and ratify the treaty, so long as the treaty shall be deemed in force.

**29.** The rules of positive law established by custom shall continue in force so long as a contrary custom is not proved.

**30.** The rules of international law laid down by a state by unilateral act shall be binding until legally repealed.

The rules of international law established by unilateral act have to a large extent the same character as those established by a municipal law. Hence the state which, through its constituted powers, has legally proclaimed those rules, must be considered as bound toward the other states; that is, it must see that they are impartially observed so long as they have not been legally repealed.

Any state may assume an international obligation through unilateral act (law, manifesto, diplomatic note and similar acts) and although it cannot exact reciprocal treatment from the other states, yet it must consider itself as bound toward them by its own action.

A striking example of this is found in the Italian law relating to the prerogatives of the Pope and of the Holy See, promulgated May 13, 1871. Italy proclaimed thereby the rights of the Pope and sought to assure his independence as head of the Catholic Church. We cannot share the opinion which considers that law as having established a kind of international servitude in the sense that Italy, which had assumed the obligation on the one hand, having thus provided for the independence of the Pope, and the other states which have the right to protect the interests of their Catholic subjects having accepted the law without protest or reservation on the other hand, Italy thereby undertook

a tacit international obligation to maintain the law regarding the prerogatives of the Pope.

We consider this law in fact as a municipal law which, as such, may be freely modified by the Italian legislature, without possible control by any other states. We recognize the fact, however, that political wisdom and foresight should always restrain the Italian government from interfering with that law. While it is true that, when promulgated, all governments recognized it as designed to assure the independence and liberty of the Pope, it is not certain that it would be so recognized if amended or repealed. Undoubtedly, the other states could not impair the legislative autonomy of the Italian government, but unquestionably, just as they have the right to protect the legitimate interests of their Catholic citizens, and, consequently, the free constitution of the Church to which the latter belong, so they could criticize the new law as not assuring complete independence to the supreme head of the Catholics.

We do not think it necessary to dwell longer on this question, for it does not seem probable that Italy will be so imprudent as to modify the law under consideration. Therefore, considering the actual condition of affairs, it must be admitted that Italy has, by virtue of that law, assumed the international obligation to observe it and to see that it is observed as long as it is in force, and that she would incur an international responsibility in case of its arbitrary violation.

Another example is found in the army regulations in time of war, in which Italy has, by unilateral act, established the rules of international law to be observed by the Italian army during the war. So long as these regulations remain in force they will be internationally binding, and the responsibility for their non-observance will naturally fall on the Italian government.

31. Rules of international law based on the *comitas gentium* have no binding force; no state can compel another to comply with them, nor consider their non-observance as an unfriendly act. Retorsion may, however, be considered legitimate.

#### APPLICATION OF INTERNATIONAL LAW

32. The rules of international law must in principle be applied by assigning to them the meaning deduced from the proper acceptance of the words according to their context and to the clear and evident intention of the parties.

33. No state may claim that the rules of international law should be so applied as to better its condition to the detriment of others.

34. The state which, in asserting its rights, has insisted that the rules of international law should be applied, cannot afterwards request that the rules so invoked shall not be applied, so far as it is concerned, in its disputes with other states, in the manner it has itself established.



The basis of this rule is the precept of Roman law, *quod quisque juris in alterum statuerit, ipse eodem jure utatur* (L. I, § I, Dig. II, 2). A state which has obtained a decision by invoking the application of a rule of law in its favor, must allow such rule to be applied in the same way against it.

Compare the law I, § 1, Dig., *Quod quisque juris*, with the arguments of the law 5, Cod., *De obligationibus quod semel placuit amplius displicere nequit*.

**35.** A state may demand that the rules of international law be so applied as to favor it when they do not injure others.

This rule is based on the adage: *quod tibi non nocet, alteri vero prodest, non est denegandum*.

**36.** The rules of positive international law must be applied in such a way as to insure not only the fulfillment of their purpose, but of that which, in the very nature of things, must be considered necessary to legitimately attain that object.

This rule is based on the precept of Roman law: *qui voluit finem et ea voluisse creditur quas ad illud honeste consequendum sunt necessaria*.

**37.** In applying the rules of international law, the good faith of those who established them should always be presumed, and it should be conceded that none of the parties intends to transfer to another more than it may own according to common law and the nature of things.

**38.** The rules of positive law may be applied to facts and relations of the same nature, and to similar cases and analogous objects.

#### INTERPRETATION

**39.** Rules of positive law should not be interpreted according to the literal meaning of the words, but according to the intention of the parties which have formulated them.

**40.** In the interpretation of the rules of positive law, that which leads to a useful result and excludes the useless should be preferred.

**41.** The rules of positive law should be interpreted in such a way as to best insure the respect of the rational principles of international law and to exclude the patent violation of such principles.

**42.** Rules implying a restriction of the free exercise of the natural rights of states or admitting of a derogation from the rules of common law, should be interpreted restrictively, without being

extended beyond the cases indicated and the periods of time stated.

#### SCOPE OF INTERNATIONAL LAW

**43.** International law must be considered as the common law of mankind and should be respected and applied with a view to bringing about the legal organization of society.

Mankind is the collective term including and comprising all beings taken individually or collectively, living in the society of societies known as humanity.

No human being, whether he be an individual like man or a legal entity or group (that is to say, one arising from the co-existence of a large or small number of men united by a common cause or purpose or by local contiguity) can be regarded as outside the legal community, which is based on human nature and should comprise all beings included in the term humanity.

States having active relations with one another, primarily feel the need of establishing a legal community. Nevertheless, such community should also include the groups of men, whatever the cause and object of their association, in so far as this may affect the legal organization of the society of societies, namely, humanity. Civilization and commerce constantly tend to bring the inhabitants of the different parts of the world into relations with one another and to insure to all men the respect of those rights which belong to human beings as such. The ultimate purpose of international law should be to establish a legal regulation of every kind of activity which may concern mankind.

**44.** Any state which enters into relations with other states is bound to recognize in its actual relations with them, the imperative force of international law, and to consider that law as the common law of the *Magna civitas*.

**45.** International law should be applied to every state, without regard to its political constitution and religious faith; to every man, whatever his race and color; to every group of men in whatever country they live; to every relation which happens to arise in any part of the world, whenever by reason of its nature or development that relation affects or may affect international society.

Formerly, the effect of religion was to establish a difference of legal status, so that the international law of Christian states differed materially from that of infidels. The Congress of Westphalia dispelled the erroneous idea that religion could constitute the basis of a difference of legal conditions. From that time, the principle of the legal community was admitted among Christian states having different religions. Later, it was thought that international law should be considered as the law of civilized countries only, and it was called European international law. At the present day, no state of Africa, Asia or other parts of the world is excluded from the legal community. Accordingly, except for certain limitations admitted in its application by reason of the historic and moral conditions of the peoples to whom it is applied,

international law has extended its dominion over all the inhabitants of the world and has acquired its true character as the law of mankind.

All those constituting part of the *Magna Civitas* and among whom certain relations exist should be subject to the authority of international law, which is the common law of the *Magna Civitas*, since that law must govern intercourse among all divisions of peoples, and provide for the legal organization of the society which comprises mankind as a whole.

46. The imperative force of international law, based on perfect equality, should be considered as in fact limited to the states among which, by reason of their civilization, there should be developed the fundamental legal principles indispensable to the admission of the community of law among them.

47. A state which, owing to lack of civilization or traditional prejudices based upon religion, customs, political institutions, or other cause, is actually unable to guarantee the respect and observance of international law, cannot demand its application with perfect equality so long as it is not internally so organized as to be, in a measure, on the same footing with other states.

It is an undeniable fact that the various countries of the world differ greatly according to their degree of civilization. This explains the non-existence of the *de facto* condition indispensable to a complete legal community among all the peoples which make up mankind. In our opinion, such a community will never be brought to realization equally and uniformly with all states, because it will never be possible for civilization to extend uniformly over all parts of the world. History shows us that civilization describes parabolas, as our eminent countryman, Vico, tells us in his profound studies on civilization. Thus, it follows that the legal community may in fact be considered as complete in countries endowed with a certain degree of culture, whereas it must indeed be limited in other countries whose civilization is as yet inferior. However, just as the basis of the reciprocal moral and commercial needs of peoples enlarges, so does the domain of international law gradually widen.

48. It is incumbent upon civilized states to promote the gradual development of international law in all parts of the world so that it will govern the relations which may be established between civilized and uncivilized peoples.

#### LEGAL PROTECTION OF INTERNATIONAL LAW

49. States living in a *de facto* society must insure the respect of international law and restore its authority in case of arbitrary violation by means of appropriate and reciprocally binding institutions and legal measures, in order to avoid war.

50. The institutions and legal measures established by common agreement with a view to insuring the authority of international law must be considered as under the collective legal protection of the states which established them.

Since, notwithstanding the non-existence of a legitimate superior among states, it is urgently necessary that the legal organization established by agreement be maintained in its integrity and be not violated with impunity by any of them, it must be admitted in principle, we believe, that all the states which have established a certain legal organization should be considered as jointly and severally interested in protecting it by all legal means. Therein lies the justification of the right of collective legal protection. Whenever a state violates the rules of international law in its relations with another state, the immediate damage arising from the arbitrary act not only violates the right of the injured state, but also that of all the states jointly and severally interested in the legal organization of international society. That is why the states should be given the right to restore the authority of the common law.

At the Hague Conference, certain useful institutions were created to remove many causes of war, and on that matter we expressed our opinion in the Appendix to volume one of our *Diritto internazionale pubblico*, 4th ed. (Union Tipografica-Editrice, Turin, 1904). It cannot be claimed, however, that the idea of legal protection has been given much thought by the various governments. It would be necessary in the first place for each one to understand the common reciprocal usefulness of maintaining the authority of law in the society of societies. At the present time, every state is actuated with the egoistic desire of protecting its own interests. We are convinced, however, that in the course of time it will be better understood that the legal organization of international society is strictly connected with the existence and the moral and material prosperity of the states belonging to it.

51. Civilized states may have recourse to any legitimate form of influence which will induce the majority of states to recognize and observe the legal institutions and measures to which they have agreed.

This rule tends increasingly to enlarge the domain of law, and to promote the progress of civilization, which can exercise its full influence only when law becomes the sovereign of the world. We do not believe, however, that such result will ever be reached, because civilization is constantly describing its parabolas and is subject to the law of ebb and flow. Be that as it may, we believe that the institutions and measures designed to prevent war and to affirm the authority of law, will be established gradually, in proportion as the domain of civilization enlarges.

52. States establishing particular rules of law with one another by means of conventions, may also agree upon special measures to insure their respect, provided, however, that such measures be permitted by and be not contrary to international law.

**53.** The rules of international law based on the *comitas gentium* must be observed for reciprocal utility. The state, to whose detriment they are disregarded, cannot have recourse to legal measures to compel their respect by the other party; it may only request the explanations to which it is entitled and exercise a right of retorsion in case of non-observance without justifiable reason.

Retorsion is a legitimate coercive measure in time of peace; it is a political expedient to compel the state against which it is directed to cease injuring another state in order to avoid more serious measures.

#### THE SCIENCE OF INTERNATIONAL LAW

**54.** The object of the science of international law is to study the nature of the relations which are formed among the states and those which arise among the persons and legal entities co-existing in the *Magna civitas*, and to select the facts which may concern the international society. It must search for, determine and formulate the legal rules best adapted to govern such relations and facts.

**55.** It is incumbent on the scholar to follow the philosophic-historical method and to make use of induction and deduction, in order to discover in the legal organization of international society, in the past and in the present, the point of departure for ameliorating the law which must govern that society in the future.

The law best adapted to govern human society must necessarily have its historical evolution, since the development of any form of activity determines new moral exigencies and constantly extends the sphere of law. Consequently, positive laws in general can not be absolute and permanent, but must be modified and adapted to new historical and moral conditions, so as to obtain the best and avoid the worst ends.

These principles must find their application even with regard to the laws best suited to govern international society, which is subject to the force of constant progress. Therefore, it is the duty of scholarship to search for and determine the legal rules best adapted to new historical conditions.



**BOOK ONE**  
**PERSONS AND MORAL ENTITIES SUBJECT TO IN-**  
**TERNATIONAL LAW**

**TITLE I**

**PERSONS AND THEIR INTERNATIONAL RIGHTS**

**WHO IS A PERSON?**

**56.** Every being or entity must be deemed a person in international society who possesses *jure suo* individuality, liberty and the ability to act in the *Magna civitas*, and who has the right to request in his relations with other beings or entities the application of international law.

The substantial characteristics of a person are individuality, will, freedom and the ability to maintain legal relations or connections with other beings who, possessing like characteristics, belong to the same *de facto* society. Now, as we see it, in order for a being to be considered as a person of the *Magna civitas*, it is indispensable that he be possessed of individuality *jure suo*, as well as of will, freedom and the capacity to enter into legal relationship with other beings who are members of the international society.

We believe it to be indispensable that individuality be his *jure suo*, because, otherwise, he could not demand or vindicate his rights in his own name, nor require respect for them as against all the world, nor invoke in his relations with other beings who possess the same characteristics and legal condition, the application of international law.

There are certain entities endowed also with the will, liberty and faculty to act and exercise their own rights, but to whom individuality belongs not *jure suo* but only by virtue of the territorial law and power of the State. Such are the associations and groups of men organized for a certain civil or social object, to whom personality is assigned by an act of the State giving them the character of *juridical persons* or corporations. They may also exercise a sphere of action beyond the limits of the territory in which they have obtained personality, but they cannot take advantage *jure suo* of the right to act as persons, and to exercise as such their rights in international society, for the personality which they hold from the State, being a legal fact essentially territorial, makes them necessarily territorial persons, but not international persons. Their personality does not exist in effect *jure suo* in all parts of the

universe, but is subordinated to a previous recognition by the government at the head of each state. Therefore, in our opinion, the legal persons who may, by reason of that recognition acquire the faculty to develop their activity in the *Magna civitas*, cannot on that account be considered as persons of the international society. Accordingly, townships, provinces, corporations, industrial and commercial societies, even when they may under certain circumstances exercise their activity in foreign countries, cannot for that reason assume the status of international persons.

#### THE STATE IS A PERSON

57. The State is an association of a considerable number of men living within a definite territory, constituted *in fact* as a political society and subject to the supreme authority of a sovereign, who has the power, ability and means to maintain the political organization of the association, with the assistance of the law, and to regulate and protect the rights of the members, to conduct relations with other states and to assume responsibility for its acts.

58. The State is by full right a person of the *Magna civitas* and must as such be considered capable of entering into relations with other states, of acquiring the rights that it may possess, of enjoying and exercising them, of performing the legal obligations incumbent upon it, and of invoking in its relations with other states the application of international law.

The State possesses individuality *jure suo* resulting from its political constitution as a state. All peoples who by virtue of their will and freedom constitute a state assume thus, *jure proprio*, the character of persons in the *Magna civitas*. In effect, as soon as politically constituted, it has the power to require of all other states the respect of its own rights and of all that belongs to it; it may, besides, in its relations with other states, require the application of international law. That point is unquestioned, and even most authors admit that the State alone must be considered as a person in the *Magna civitas*.

#### INTERNATIONAL RIGHTS OF THE STATE

59. Every state having some form of political constitution and a government capable of entering into political relations with other states and of assuming responsibility for its acts, has the right in its relations with other states to be considered as politically constituted.

International law need not be concerned with the legitimacy of the constituted powers, in contrast with constitutional law which admits of the study of these same powers according to internal law, and consequently, the examina-



tion of their legitimacy. *Qui de facto regit* is considered as sovereign in international society. Consequently, international law must apply to states as they are and as history has made them.

60. Every state which is considered as politically constituted, is entitled to assume *jure suo* the status of a person, independently of the formality of recognition (compare rule 168) and may require in its relations with other states the application of international law.

61. Every state politically constituted must be considered *ipso jure ipsoque facto* as possessed of all the rights which ought to be considered as its rational rights and of the ability to assume international obligations in its relations with other states.

62. The rational international rights which every state possesses are those which by reason of its nature as an institution must be considered indispensable in order that it may exist, with its necessary characteristics. These are:

- a. The right of autonomy, independence and liberty;
- b. The right of sovereignty and jurisdiction;
- c. The right to legal equality;
- d. The right of representation.

63. The rational rights of the State must be considered as absolute, inalienable and intangible.

64. Every state admitted into relationship with another state must be considered as being so admitted with the enjoyment of its rational international rights, and it may *ipso jure* exercise the said rights without any authorization from the sovereign of the state.

65. No limitation upon the enjoyment and exercise of the rational rights of the State can exist except by virtue of a general treaty subscribed and ratified by the State, or of a special treaty concluded and ratified by two states, or of the constitutional law of both countries.

No limitation of the said rights can be based on analogy or induction (Cf. rule 42).

The two rules set forth are based on the just idea that every state is free to enter into relations with another state, but that, being unable at its own volition to concede or deny that such state is a *jure proprio* person of the *Magna civitas*, it cannot decide arbitrarily whether that state may or may not enjoy its rational international rights, that is to say, those which are its own as a state according to international law (see Fiore, *Consultazione tra la Grecia*

*e la Romania, successione Zappa*, Rome; *Della personalità giuridica dei corpi morali e della personalità giuridica dello Stato a l'interno e all'estero; Questioni di Diritto*, Turin, Unione Tip.-Editrice).

#### MAN IS A PERSON

66. Man must be considered as a person of the *Magna civitas*; as such he is a subject of law in his relations with international law.

Man is the natural person. He is born and exists according to natural law with his own individuality and is endowed with liberty and the capacity to maintain legal relations with other persons.

It is important to remember that human individuality and the rational rights which belong to man as such exist as well in his relations with civil society as in his relations with both political and international society. Man must, therefore, be considered as a subject of law in so far as all the relations he may establish by reason of his liberty and activity are concerned.

As regards civil society, he must be considered as a subject of private rights even when he has not the status of citizenship in a particular state. As regards political society, when he belongs to it as a citizen, he must be considered as a subject of those private and public rights which rest upon citizenship. As regards international society, since his individuality in his relations with mankind, far from being lost like a drop of water in the ocean, subsists with his personality and all the rights which are his in accordance with rational law, he must be considered as a subject of the international rights which are based on rational law. Therefore, he may claim the application of international law and the respect of what we call the international rights of human personality in his relations with mankind, that is to say, in the relations which, by reason of his liberty and activity, he may establish with other men living in the *Magna Civitas* and with the various states belonging to international society.

Would any one venture by any chance to maintain that the man who is not a citizen of a particular state, whatever his race or color or whether he be civilized or not, may within international society be considered as a material thing, incapable of being a subject of rights? That, independently of treaties, man cannot require respect for the rights of his human personality, those rights which belong to him as a man according to rational law?

If that cannot be reasonably maintained, can it be denied that man, as such, must be deemed a subject of the international rights arising out of his nature as a human being?

We know very well that our theory is received with some distrust, owing to the fact that most authors consider as international rights only those belonging to states in their relations with other states and which have been recognized and consecrated by treaties. It is said, in order to combat our opinion, that man has neither the power to conclude a treaty nor to assume an international obligation. But to such criticism we answer that we never meant to claim that man could be the subject of the international rights which belong to states alone in their relations with one another.

In their respective relations with the *Magna civitas*, the status and personality of the State is one thing, the status and personality of man, another. That is why it must be admitted that the international rights which they

respectively possess must differ substantially, as well as their ability to act and bind themselves mutually. Accordingly, it may be said with reason that only a state may conclude a treaty and assume an international obligation. This is based on the just principle that every international obligation has the nature and character of a public and political obligation and that the State alone has the necessary capacity to contract it, because it alone is a political and public institution. Man, as we shall note in Book II, has not the capacity to assume an international obligation and cannot claim the enjoyment in the *Magna civitas* of the rights appertaining to the State. We hold, however, that he may require the respect and the enjoyment of the rights based on human nature. That is, in that respect he must be considered *jure suo* as a subject of international rights.

The theory which we have always sustained, previously set forth by Heffter (*Le droit international de l'Europe*) and criticised by his annotator Geffcken (§ 14, note 2 and § 58), has been admitted by Chrétien. It has also been admitted by Bonfils in his important work, *Le droit international public*, § 157. It is to be hoped that other courageous champions will be found and that, just as the rights of human personality with regard to internal public law have been successfully vindicated by proclaiming the rights of man in the political constitutions of all civilized countries, so the international rights of man as regards international law will be finally proclaimed.

We find in an important international document of our time facts tending to corroborate us. Article 40 of the treaty of Berlin of July 13, 1878, prescribes that, until the conclusion of a treaty between Turkey and Servia, Servian subjects must be treated *in accordance with the general principles of international law*. Thus, it was admitted that man may find the basis of his rights in international law.

#### INTERNATIONAL RIGHTS OF MAN

67. The international rational rights of man are those which belong to him as a man. They constitute the international rights of the human personality. They are mainly:

- a. The right of liberty and personal inviolability;
- b. The right to choose citizenship in a certain state, to renounce the one acquired and to select another;
- c. The right to emigrate;
- d. The right of unhampered activity and international trade;
- e. The right to own property;
- f. The right to freedom of thought;

68. No man can claim the enjoyment and exercise of his rational rights unless he abides by the laws of the country in which he expects to enjoy and exercise such rights.

69. The positive international rights of man are those he may enjoy as a citizen of the state by reason of the treaties concluded between that state and other states.

Every individual may claim the right to enjoy in international relations all the rights, advantages and privileges which, by the terms of the treaties between two states, are reserved for their respective citizens. Thus, for instance, the right of authors of literary or artistic works to request and obtain the protection of their works, belongs exclusively to citizens of the states which have signed the convention of the international copyright union, or adhered thereto. Private rights granted to the respective citizens of states which are parties to treaties of commerce, capitulations and consular conventions, must be deduced in like manner.

#### THE CATHOLIC CHURCH IS A PERSON

70. The Catholic church is an institution constituted as a result of freedom of thought by a great number of men scattered all over the world, but united in a religious association by the bond of a common faith under the supreme authority of the Pope, who maintains the unity of the association by promulgating the dogma and principles of its belief, and by providing for its government without resorting to coercive measures.

71. The Catholic church is a person of the *Magna civitas*.

The Catholic church, taking it as it is, as time, tradition and history have made it, is a world institution admirable by reason of its organization, gradually cemented by the work of twenty centuries and preserved by the most compact and well-disciplined hierarchy that ever existed. It has as such its individuality *jure suo*, since it is constituted by virtue of the right of liberty of conscience which belongs to every man, such right assuming the character of a collective right with regard to all the believers who formed the Catholic church. Moreover, it possesses its own sphere of activity, which is not restricted to the territory of any one state, but is exercised over all parts of the world where there are believers united in religious association under the supreme authority of the Pope by virtue of unity of faith, discipline and worship. Since it is undeniable that the Catholic church is in fact an international institution, that it is such *jure proprio* and that it belongs to the *Magna civitas*, it must, therefore, be conceded that it is also a person of the international society.

The great difficulty which lies in the way of the acceptance of our idea is the fact that the Catholic church is at once a religious association exercising its rights within the state, and a corporation residing in the said state, by reason of which it falls under the power of the sovereign and must obey the provisions of public territorial law.

It is truly difficult to consider the Church from each of these points of view. Consequently, certain publicists such as Bluntschli (rule 28, *Droit int. codifié*), Heffter-Geffcken (*Droit intern.*, § 40), T. Martens (*Droit intern.*, v. I, p. 426), Pradier-Fodéré, no. 81; Bonfils (*Droit intern.*, § 155), have held that they could not admit that the Catholic church had an international personality. They stated in effect, that it is the public law of each country which determines the rights and privileges of the Church as a corporation; that it is the political legislation of the State which regulates the acts of the Church and the responsibility of the persons designated to exercise their functions as

ministers of the Pope; that, in substance, everything is regulated by concordats when there are any, and in their absence, by public internal law, and that nothing belongs to the domain of international law. Hence, they say, the Church has no international personality.

After carefully considering every side of the question, we, on the contrary, deem it necessary to distinguish the Catholic church as a universal institution from that church, considered as an association and corporation existing within the state; and we believe, that by determining, on the one hand, the legal rights and faculties which belong to it as an association of men scattered over all parts of the world and united by the same religious belief under the authority of the Pope, and by examining, on the other hand, the legal rights and powers that are accorded to it within each state as a corporation, one may admit the personality of the Catholic church as a world institution, without curtailing in any way the authority of public internal law over it.

We concede that public internal law is controlled by international law, which fixes the legal sphere within which the absolute autonomy of the sovereignty of every state can be admitted. Therefore, the international rights which belong to persons existing in the *Magna civitas* are quite different from those which may belong to them in their relations with internal law. The fundamental question is always the same; it consists in establishing whether or not a being or entity may become the subject of international rights. Now, we hold that the Catholic church, as a world institution, must be considered as a subject of public rights, and even, under the circumstances, of private rights, if it is characterized as a legal person under the terms of internal law. We concede, therefore, that as a world institution, it is a person of the *Magna civitas*, and may require the application of international law; and that as a corporation, it has the same status as any association existing within a state, and consequently must be subject to the authority of public internal law.

Bonfils agrees with the opinion that international personality is denied the Catholic church, on the ground that public international law does not regulate the relations of the Catholic church with states. He notes, besides, that it is public internal law, which, in treating the Church as a corporation subject to political legislation, determines the rights and privileges that are accorded to it, as well as the restrictions it must suffer as a corporation.

We grant that, in general, international rights cannot be accorded to persons unless they are subject to international law; but that such rights must be declared and regulated whenever, in accordance with the principles of natural justice, such rights are conceded to them.

It is a fact that in the great republic called humanity or mankind, the Catholic church exists as a world institution, and as such, has its own individuality independently of territorial law. It is also certain that its followers, scattered over all parts of the world, by reason of the right of religious liberty, recognize the authority of the Pope as their supreme head. Now, the ensemble of the indispensable conditions required, according to principles of justice, in order that such a world institution may exist, constitutes the international rights of the Catholic church as a world institution, in so far as these rights do not arise from internal law, but belong to the Catholic church *jure suo* with regard to all states, and are based on the higher principles which must govern international society.

Objections are raised that political law is the only basis of the rights and privileges of the Catholic church and the whole matter, it is argued, is merely a question of public internal law. With this we cannot agree at all.

Let us study carefully the history of the occupation and annexation of Rome and of the Pontifical states by Italy. Such occupation and annexation have, with reason, been considered as questions of public internal law. Italy was able on that occasion to suppress religious corporations, to subject the Church to its internal laws so far as the acquisition of property is concerned, to regulate the exercise of worship, to subject the ministers of worship to the authority of civil and penal laws even in regard to the exercise of their calling, and no one had or will have the right to interfere with such measures, which are fully within the domain of the internal public law of Italy. But in occupying Rome, would it have been possible for Italy to interfere with the independence of the Pope, to prevent or restrict the exercise of his supreme power as head of the Church, to prohibit or hinder the convening in Rome of councils or synods, to obstruct the free intercourse of the Holy See with Catholics in different parts of the world, to forbid these Catholics coming to Rome to recognize the Pope as their supreme head, and finally to deny the Pope the right of representation in his relations with foreign governments wishing to maintain diplomatic relations with him?

Can these questions in any way be considered as within the domain of public internal law?

It is with good reason that the suppression of concordats, the separation of Church and State and the suppression of certain privileges have been considered as within the domain of public internal law; but could it ever be possible to regard as within the domain of this law the denial of the right of religious belief for Christians, the massacre of Christians and their persecution by infidels aroused by religious fanaticism? Can it be held that attacks upon the natural rights of the Church and its members must be treated with indifference by international law, because it does not regulate the relations of the Catholic church with the various states?

History points to the contrary. The worthy idea of Cavour, the free Church in the free State, the diplomatic note of Viscount Venosta informing the Catholic world that Italy in occupying Rome intended carefully to respect the independence of the Pope and the Church, the law of May 19, 1871, proclaiming and guaranteeing the rights of the Papacy in its relations with the international association of Catholics and with the Italian State,—everything, so to speak, tends to prove that the Church, as a world institution, must be endowed with certain rights, independent and quite distinct from those which it possesses as a corporation and religious association in its relations with each particular state, for the latter must be governed by public internal law.

To conclude, the Roman Catholic church, as a world institution, should be considered as a subject of international rights—which we shall indicate presently—and is consequently, as such, a person of the *Magna civitas*. It is therefore evident that in regard to the rights we call international rights, the Catholic church may claim the application of international law and the collective *legal* protection of civilized states.

**72.** Every Church may be regarded as a person of the *Magna civitas* when, considering its constitution and organization, it actually occupies the position of an international or world institution.

International law must, in principle, protect the right of freedom of conscience both as a right of man and as a collective right. It must, therefore, safe-

guard the freedom of religious association and faith. Nevertheless, in order that a Church may assume the condition of a person in the *Magna civitas*, it is indispensable that it be a world institution. It must, therefore, comprise a great number of followers scattered all over the world and associated by reason of their common belief and, finally, organized under the authority of a chief who effectively exercises over them his supreme power through the clergy and religious hierarchy.

#### INTERNATIONAL RIGHTS OF THE CHURCH

**73.** The international rights of the Roman Catholic church are those which belong to it as a spiritual and world institution. They are:

- a. The right of independence in regard to its constitution and organization;
- b. The right to liberty of government in the sphere of its purpose as a spiritual institution;
- c. The right of the Pope to maintain free and reciprocal intercourse with all persons forming the hierarchy and with the followers of the Church;
- d. The right of representation;
- e. The inviolability of the Pope as the spiritual head of the religious association.

**74.** The Church cannot be assimilated to a state, nor claim the enjoyment of the rights belonging to a state as such. Neither can it claim for its supreme head the enjoyment of the rights and prerogatives which, according to international law, belong to the ruler of the State considered as a political institution.

**75.** The Church, which, as a spiritual world institution, is an international person, cannot claim any territorial domain on the pretext that such domain is indispensable to its independence, nor the enjoyment of any right whatever based on territorial sovereignty or ordinary jurisdiction which implies the exercise of temporal and political power.

The international rights to be assigned to the Church are those, we believe, which, considering its nature as a spiritual world institution, are indispensable to it in enabling it to exist as such and to attain its ultimate purpose. Its primordial and fundamental right is independence; but in order to insure for that right a firm legal basis, there is no need of political independence, territorial power, ordinary jurisdiction, the right of imperium or finally, coercive power. The whole thing is summed up in the perfect freedom of promulgating the dogma and principles of the faith, by bringing them to the knowledge of

the individuals who wish freely and spontaneously to recognize them. Consequently there cannot be anything in common between the rights of the State and those of the Church, between the rights of a political sovereign and those of the Pope. The sovereign exercises his power over the persons in his territory; he must be invested with coercive power so as to fulfil his mission, which consists in providing for the unhampered development of freedom and activity of every one in his own legal sphere. The head of the Church does not exercise his supreme power within certain territorial limits, but extends it all over the world. His subjects are souls, and his function consists in promulgating principles of faith without resorting to coercive measures. Consequently, it cannot be said that the Pope exercises any territorial and temporal power, or claims any of the rights belonging to the sovereign of the State as head of a political institution.

In considering the Catholic church as a person of the *Magna civitas*, we assign to it the rights which we believe are its international rights. We cannot, therefore, allow it the power to acquire international rights, as a state does, by means of treaties. In fact, concordats are acts of public internal law, on which international rights cannot be based.

We find the solemn recognition of the rights of the Catholic church in the Italian law of May 13, 1871, promulgated with a view to proclaiming them before the whole world. Those who deny international personality to the Church should consider that if the Holy See were to reside outside of Rome, it would be incumbent upon the sovereign of the state in which the Pope might reside, to do spontaneously what Italy has done, namely, to proclaim and guarantee the international rights of the Church. Otherwise, by virtue of the principles of international law, the power to insure the free exercise of the international rights of the Holy See would reside in states having Catholic interests to protect, especially in those professing the Catholic faith.

76. The Church cannot possess *de jure* the right to acquire property or to be considered as a universal juridical person: it may enjoy such a right only by express grant of the territorial government. In such a case, it may be deemed a juridical person within the limits of the territory of the State and must conform to the territorial law as regards the acquisition and exercise of any property right.

Certain authors who do not recognize the distinction between the position of the Church as a person of the *Magna civitas* and that of a juridical person, combat our theory, claiming that the Church cannot be a universal juridical person.

That is, for instance, the contention of Professor Scaduto. However, far from ever having asserted it, we have denied that the Church could be an international juridical person. See Fiore, *Diritto internazionale pubblico*, 3d and 4th ed., vol. I, *Dei diritti internazionali della Chiesa*; Id., *Diritto internazionale codificato*, 1st ed., 1890, rule 31, note, and 2d ed., rule 37, note, pages 81-82; 3d ed., rule 37; 4th ed., rule 71, pages 120-121, and the present note.



## INDEPENDENT TRIBES

77. Every independent tribe, which has its own organization and recognizes the authority of a supreme chief who rules it and respects the fundamental principles of international law, must be considered a person of the *Magna civitas*.

78. International law should be applied to independent tribes within the limits determined by rules 46 and 47.

Independent tribes are those which inhabit a certain definite region and have a certain form of political constitution according to their written statutes and common law. Each of them usually has a chief, hereditary or elected by the people. He himself appoints the subordinate chiefs, over whom he exercises supreme authority, having the power to depose them or to call upon them to give account of their duties and to punish them, or to decide disputes arising among them.

When tribes have a more or less perfect political organization, international personality should not be denied them, although they cannot be assimilated to a state. It must be conceded, of course, that international law should be applied to them in varying degrees to accord with historical exigencies; but they cannot be excluded from the legal community as claimed by certain authors who wish to make legitimate certain usages, especially the conquest of the territories of those peoples, under the pretext that uncivilized independent tribes do not belong to international society. It must certainly be recognized that there are civilized, uncivilized and barbarian nations in the world. We believe that they should all be subject to the superior authority of international law, although we admit that it cannot be identical for each of them, but must be modified as needed to conform to historical and moral exigencies.

## INTERNATIONAL RIGHTS OF INDEPENDENT TRIBES

79. Every tribe organized according to its own law, having any form of government capable of commanding the respect of the fundamental principles of international law, may require that in its *de facto* relations established with civilized states, international law may be applied with the limitations justified by its historical and moral status.

80. The violent conquest of an independent tribe must be deemed a veritable violation of the common law of humanity.

Independent tribes cannot be considered as outside the law of humanity. It can only be said that they cannot require the full application of international law, as is the case with civilized states.

## LEGAL ENTITIES

81. The status of a person in international society may be claimed by legal entities personified by reason of a well-defined purpose of international interest. This status is limited to the states which have recognized them as persons and given them the right to acquire certain privileges, which they must exercise and enjoy in order to fulfill the international mission for which they were created.

82. The international personality of legal entities must, in principle, be considered as limited to the exercise of the international rights granted to them, and it cannot have any effect on states which have not recognized these entities as international juridical persons.

The condition of legal persons according to international law is similar to that of legal persons under the civil law. The individuality of these two classes of persons which, as we have said elsewhere (rule 56), must be considered as an essential condition of their existence, depends on the personification which proceeds from the purpose by reason of which legal entities that are not persons *jure proprio*, acquire personality. Legal persons must be considered individualized in consequence of a legal fiction and become persons by virtue of the act granting them the capacity to operate, to bind themselves and to be considered the subjects of rights.

There are numerous instances in which the capacity to exercise certain international rights was conferred on certain legal entities, by the consent of states. Such was the case with the German confederation. It is also the case with the International Congo Association, which prior to its being incorporated with Belgium, was recognized by Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden and Norway. (See *Nouveau Recueil général des traités*, continuation of Martens, by Jules Hopf, 2d ser., v. X, 1885, and the important work of Catellani, *Le colonie e la Confederenza di Berlino*, chap. VIII, *Associazione internazionale del Congo*, p. 499.)

## TITLE II

### PERSONS UNDER THE AUTHORITY OF INTERNATIONAL LAW AND THEIR RIGHTS

**83.** Groups of men united by a common cause, reason or purpose, so far as they interest international society in the exercise of their rights and the development of their activity, constitute beings which must be considered subject to international law. Such are:

- a.* The people;
- b.* The nation—in the sense of a nationality;
- c.* Uncivilized tribes.

#### THE PEOPLE

**84.** Men who inhabit the same territory, live under the same laws, and are united by the bond of common civil, economic, social and political interests, constitute the people.

#### THE NATION

**85.** The nation is composed of people of the same origin and race, who speak the same language, live in the same region, and are united by the bond of common traditions, aspirations, affections, and uniform and constant moral tendencies.

#### UNCIVILIZED TRIBES

**86.** An uncivilized tribe is composed of a group of persons, formed by the union of families. It lacks a definite political organization and has neither the laws nor the customs of civilized peoples.

#### INTERNATIONAL STATUS OF THE PEOPLE AND OF THE NATION

**87.** The people and the nation cannot be considered as persons of the *Magna civitas*. They cannot claim the necessary capacity

to exercise their rights and assume international obligations until they have succeeded in organizing themselves as a political body and constitute an independent government.

However, as groups of men, while exercising their collective rights, which may be of international concern, they must be considered subject to international law.

The distinctive characteristic of a person is individuality; hence, the characteristics of international personality are individuality independent of territorial law and a sphere of activity which cannot be limited to the boundaries of any one state. Consequently, we deny the character of international person to the people and to the nation, because neither one possesses the necessary qualifications of international activity and capacity. The bond of community capable of making a people or a nation of a group of men is not sufficient to give them the capacity to act in the *Magna civitas* so as to be considered as a person of the international society, except in the case where men, thus united, have made their union effective by the adoption of a certain political constitution; that is to say, by establishing a government personifying and representing the principle of their union. So long as the people or nation do not attain that result, it may be said that they are in a state of evolution tending toward personality. So they must be considered as possessing certain rights based on human nature, which are theirs as collective beings. In reality, they are not actually persons, but (if I may be permitted to use the expression) they are persons *in fieri*, persons *in futuro*. The people and the nation from the point of view of international law seem to us analogous to the unborn child *in ventre sa mère* from the point of view of the civil law.

88. The international status of the people and of nations is essentially different and distinct from the condition of the State (Cf. rules 57 *et seq.*).

#### INTERNATIONAL RIGHTS OF THE PEOPLE

89. People who intend to establish or modify their political constitution, have the right to expect, so far as everything pertaining to their internal life is concerned, no interference from foreign governments.

90. The acts of a revolutionary faction, engaging in hostilities to settle a question of public moment, must be governed, as regards any domestic conditions, by the public law of the State, and as regards any external effects and relations, by international law.

91. When a government constituted by the people as a result of a revolution, is found to be possessed of rights of sovereignty, it must be admitted by other states to be legally constituted.

Such a government may demand that its relations with foreign powers be regulated by international law.

According to the principles of international law, he is sovereign *qui de facto regit*. The legality or illegality of a constituted government is a question of internal public law. Even when a government constituted in evident violation of the principles of common law succeeds in establishing itself, it may in its relations with other states, invoke the application of international law.

#### INTERNATIONAL RIGHTS OF NATIONALITIES

92. Populations which fulfill the requirements necessary to make them a nation, have chiefly the right to unite with one another as a political body and to constitute a State.

93. No sovereign, on the basis of treaties, dynastic interests or prescription, can properly maintain the right to set bounds to the liberty of people of the same nationality who wish to unite politically in conformity with their national aspirations.

94. International law should protect the formation of national states, safeguard the rights of people of the same nationality and should see that the national aspirations spontaneously and constantly asserted are not repressed by deception or force.

In order to strengthen the legal organization of international society and to eliminate several causes of internal struggles, it is especially advisable to favor the formation of national states.

#### INTERNATIONAL STATUS OF BARBAROUS POPULATIONS

95. Barbaric people, even when they settle in a territory where they live as they please and recognize the authority of their chief, cannot be considered as persons of the *Magna civitas*; yet, so far as concerns the *de facto* relations which may be established between them and states, they may invoke the application of international law within the just limitations determined by circumstances and by their status.

96. Nomadic peoples who have no form whatever of political organization and who live in their own way on the territory they occupy, must be considered as subject to international law, in so far as it protects the rights of human personality.

In applying this rule, we must admit that people occupying certain regions, such as the Arab shepherds who till the ground and hunt, cannot be unjustly

treated and ruthlessly deprived of their lands. International law must be applied to them in conformity with the requirements of justice, by observing the general duties resulting from the obligation to respect the rights of man and of human personality.

#### INTERNATIONAL RIGHTS OF BARBAROUS TRIBES

97. Barbarous tribes, living in their own way, may always, in their relations with civilized states, require the respect of the international rights of the human personality, which are theirs. Therefore, it is not lawful for Christian and civilized states to consider barbaric and uncivilized tribes as outside of the law of humanity.

98. Barbarous tribes have the right to retain the land they actually occupy and the right not to be deprived of it by violence or without their consent, in open defiance of the fundamental principles of international law.

At the Conference of Berlin, where the final act relating to the occupation and civilization of the African regions was drawn up, Mr. John A. Kasson, delegate of the United States, spoke as follows at the session of January 31, 1885: "International law constantly follows a course which leads to the recognition of the right of indigenous races to provide for themselves and their hereditary property. In conformity with this principle, my government would willingly submit to a broader rule based on a principle which would aim at the voluntary assent of the natives whose country is taken possession of, whenever they have not provoked an aggressive act."

99. The right to occupy land which is of no use to the savages cannot be denied to civilized states; but it is incumbent upon them to effect such occupation by the employment of means least injurious to the savages from whom the useless land is taken.

This rule is based on the principle that the earth is in general designed to serve the needs of everyone and that it is not permissible that savages who are unable to derive any profit from natural products should be allowed to leave sources of wealth unproductive, leaving the ground uncultivated. See Fiore, *Diritto internazionale pubblico*, 4th ed., § 867.

#### JURISTIC PERSONS

100. Juristic persons are akin to natural persons in the exercise of the rights assigned to them under the law of the state which recognizes them. They cannot for this reason exercise their rights in another state unless they have legally been recognized there.

This rule applies to juristic persons or corporations proper, formed from all classes of associations of men, property or purposes, to which the sovereign of the State has granted personality and the capacity to exercise the rights considered necessary to the realization of their social usefulness, which is the purpose of the association. Even when, in order to attain that end, it may be of general interest that the legal entities extend their sphere of activity to foreign countries, they cannot do so without the authorization of the sovereign of the foreign state, granted to them in the form of recognition or otherwise. What we have said of the nation, people and uncivilized people cannot be applied to legal entities. It is a fact that in the case of the former, the bond of union is based on human nature and finds its efficient cause in natural factors. On the other hand, as regards legal entities, this bond results from their purpose, in consideration of which the government has given them the right to be the subjects of law. It follows, therefore, that such persons cannot *de jure* extend their sphere of activity into foreign countries without the previous authorization of the sovereigns of those states. Cf. Fiore, *Diritto internaz. privato*, 4th ed., vol. I, parte speciale, Cap. II,—*Consultazione sulla controversia fra la Grecia e la Romania. Successione Zappa.*—*Della personalità giuridica dei corpi morali*, Extract from *Giurisprudenza Italiana*, vol. XLVI-XLVII.

## TITLE III

### POLITICAL CONSTITUTION OF THE STATE WITH REGARD TO PERSONALITY

**101.** The political constitution of the State and its modifications should be considered as matters subject to public internal law. Yet the political constitution, in so far as it establishes the sovereignty of the State and regulates the form of political organization, exercises its influence on the international personality of the State where the exercise of the international rights of the State is concerned.

#### SIMPLE STATE

**102.** Every political organization having, according to its constitution, a single undivided and permanent central power, assigned to a ruler invested with the right to represent the State and to contract international obligations in its name, is called a *simple* State. A state so organized has without doubt a single international personality.

France, Italy, Russia and Spain are simple states.

#### COMPOUND STATE

**103.** A compound state is one formed by the union of several states which have, by virtue of a constitutional agreement, established a central power, which exercises sovereign functions in their behalf, represents them in their relations with other states and is empowered to contract international obligations in their name and to protect their rights and interests in their relations with other states.

A compound state may present different forms of structure: federal union, real union, personal union, or confederation.



## VARIOUS FORMS OF A COMPOUND STATE

104. A compound state may assume the form of united states, incorporate states, federated states, federal empire, or real union, whenever a central power representing the union of states is established. Whenever united states give a unitary form to their union, their international personality must be considered as single or sole.

The structure of states under the authority of a common sovereign is capable of various forms. One of these forms is represented by the union of the United States of America and that of the Swiss cantons. This is the result of the submission of independent states to the authority of a central power, superior and sovereign, not only as regards its powers with respect to the associated states or cantons, but particularly in its relations with foreign governments. Consequently, the sovereign of the union has the power to negotiate and conclude treaties of alliance and commerce in conformity with the rules established by the constitutional law; to declare war and conclude treaties of peace; to accredit and receive diplomatic agents; to exercise all the international rights belonging to each state and to assume international obligations. This sort of union is called "federal State."

Another form of union is called real or incorporate. This is the result of the union of two or more states, which preserve their own individuality in matters of public internal law, but at the same time, recognize a single sovereign power charged to represent them in international relations, to exercise rights against and to contract obligations with other states.

Sweden and Norway, united under the authority of a single ruler by virtue of the act of Charles XIII of August 6, 1815, each had its own government, its special legislation, its own parliament and its distinct cabinet ministers, so that while each preserved its individuality in its internal relations, they were represented in the exercise of international rights by a single sovereign power. In effect, the power to conclude treaties, to receive and accredit diplomatic agents and to regulate all affairs of common interest in the relations of the two states with foreign countries was exclusively granted to the King of Sweden. That union, which had the characteristics of a real union, has ceased to exist owing to the separation of these two countries on the 26th of October, 1905. In like manner, the union of the three kingdoms of England, Scotland (united since 1707), and Ireland (united since 1801), under the name of United Kingdom of Great Britain, is an instance of what English publicists call *incorporate union*.

Another example of union is found in the German Empire. It also has the character of a compound state, but in the unitary form, in spite of the absence of any establishment of a central power, separate and distinct from the sovereign power belonging to each of the confederated states. It is, in fact, the King of Prussia who has joined the imperial crown to his royal crown, in consequence of which the central power is in the hands of one of the confederated states. Therefore, in effect, all the German states, great and small, are dependents of the King of Prussia, now the Emperor, who represents all the states in the German Empire and exercises in their name all international rights. Bavaria alone, for certain particular interests, has retained the right of legation. With

that exception, since the exercise of all international rights, the conclusion of treaties, declaration of war, conclusion of peace and diplomatic relations, is assigned to the Emperor, there is no doubt that the international personality of all the states of the German Empire is one.

The character of each of these forms of union is determined by constitutional agreement. The manner in which the exercise of the powers is regulated according to public internal law, is of no moment; from the point of view of international law, all that is required is to determine how the sovereign power in its relations with other states is to be personified. When the exercise of such a power is granted to a single personality, no matter whether the form of union be federative, real or incorporate, only a single international personality can be admitted.

105. When, according to the constitutional agreement of union, each of the component states has international capacity with regard to certain acts limited to its own particular interest, international personality is not bestowed on each of them, but only the capacity to perform these acts within the limits strictly specified by constitutional law.

#### PERSONAL UNION

106. Two autonomous states, entrusting to the same person the power to exercise sovereign rights and to represent them in their relations with other states are considered in *personal union*, and each of them has its own international personality distinct from that of the other.

The bond of *personal union* does not imply the confusion of the individuality of the two states and consequently the confusion of international personality of both. Two states completely independent of one another in every respect, which have given to the same person the authority to represent them in their relations with other states, must on that account be considered as subject to personal union. It should be said, however, that the title of sovereign rights with regard to each of these two states is not the same and their exercise may consequently cease for one while it continues for the other. Personal union is not, therefore, by nature permanent.

Under the provisions of the final act of the Congress of Vienna (arts. 67 and 71), the Kingdom of the Netherlands and the Grand-Duchy of Luxemburg were constituted in a personal union. This situation lasted until the death of William III, that is, until November 23, 1890. Since, according to the constitution of the Grand-Duchy, the ruler of that state could not be a woman, and the daughter of William III succeeded him as queen of the Netherlands, the Grand Duke Adolph of Nassau became ruler of Luxemburg, in accordance with the act of June 30, 1783, and the treaties of Vienna of 1815 and of London, May 11, 1867.

The same thing occurred with regard to the personal union of Great Britain and the Kingdom of Hanover which ceased in 1838, because under the provi-

sions of the British constitution a woman could reign, while under the Hanoverian constitution a woman could succeed to the throne only in the absence of male descendants in collateral lines.

#### STATUS OF COLONIES

**107.** Colonies consist of the over-seas possessions of states. Their inhabitants have no political autonomous organization, but are in fact, subject to the power and superior jurisdiction of the sovereign of the state to which they belong.

**108.** Colonies have no international personality. Even when they enjoy a limited autonomy with regard to their own government and the authority to perform certain well-defined acts of an international character, they must be considered as parts of the state to which they belong, until they have constituted themselves as independent states.

The legal status of colonies, the various degrees of their political dependency and their power to perform certain acts in their relations with foreign countries can be determined only by referring to the special laws enacted by the government of the state to which the colony belongs, and by studying the succession of events which may have modified in law and in fact, the status of any colony. It can only be said that, as a rule, so long as the dependency exists and the colony has not been able to free itself completely from the dominant state, sovereignty, in everything relating to its functions and rights within the domain of international law, extends over its colonial domain, which in fact must be considered as a possession of that state. See Catellani, *Le colonie et la Conferenza di Berlino*.

**109.** The right of colonies to free themselves from the domination of the mother country and to form their own independent government is a legitimate right which belongs to all peoples or nations. The struggle between the colony and its mother country should be governed by the same rules as apply to civil war waged with the purpose of effecting a separation within a state and of establishing a government in conformity with the wish of the majority.

#### VASSAL STATES

**110.** When a state in the exercise of its sovereign powers is in law and in fact subject to the sovereignty of another state and is not able to exercise rights and assume obligations in international affairs except with the permission of the state which exercises

supreme authority over it, it must be considered a vassal of that state, known as its *suzerain*.

111. The relation of vassalage must be deemed exceptional and abnormal and its consequences in the domain of international law must be necessarily limited like those arising from any form of bondage.

112. As long as the subjection of the vassal state to the suzerain state lasts, the vassal state does not enjoy complete international personality.

113. The attempt of vassal states to acquire complete independence and to free themselves from the domination of their suzerain must be considered as within their legitimate right and they must be protected in accordance with the principles of international law.

Armed conflict between the vassal state and the suzerain must be subject to the rules applicable to any form of civil war.

The subordination of a vassal state to a suzerain is greater than that arising from a protectorate. It may assume various forms resulting from feudal bonds, which were the origin of vassalage. Civilization tends to establish the principle of unity of sovereignty, because in reality dualism cannot subsist, as history shows. The condition of the vassal states of Turkey was modified by the stipulations of the treaty of Berlin of 1878. Vassalage must be considered as an anomaly according to modern international law, because it implies a *capitis diminutio*. Therefore, with the progress of civilization, vassalage must naturally tend to disappear in countries still subject to the supreme authority of a foreign government.

See, with regard to the present condition of semi-sovereign states, Calvo, *Droit intern.*, v. I, § 64; Pradier-Fodéré, v. I, 86, 110; Rivier, *op. cit.*, v. I, § 4, p. 79; Bonfils, *Droit intern. public*, §§ 188 *et seq.*; Despagnet, *Droit intern.*, § 127.

#### TRIBUTARY STATES

114. A tributary state is one which pays tribute to another state for an indefinite period.

The payment of tribute cannot always be considered as an evidence of dependency. It may sometimes be an imposition inflicted by the stronger upon the weaker state to save the latter greater difficulties, and sometimes a spontaneous offer made to avoid annoyance and to secure the good will of another state.

Grotius, in speaking of states which pay tribute, says: "I do not see any reason to question their sovereignty, although the acknowledgment of their weakness detracts somewhat from their dignity." *Le Droit de la guerre*, liv. I, ch. III, § 22, translation of Pradier-Fodéré, p. 282.

Vattel writes: "The custom of paying tribute was frequent in former times: the weaker, by means of it, buying off the aggressions of the stronger or procuring the latter's protection at this price without ceasing to be sovereign." *Droit des gens*, liv. I, ch. I, § 7.

Formerly, the principal European maritime powers paid tribute to the Barbary states to exempt themselves from the annoyances of the latter. This payment, however, did not in any way affect either the sovereignty or the independence of these powers. See Wheaton, *International law*, v. I, § 14, pp. 48-49; Calvo, *Le Droit international théorique et pratique*, v. I, § 43; Bonfils, *Droit intern.*, 3d ed., § 191.

115. Tribute paid by a vassal state to a suzerain state is a manifest acknowledgment of its dependency and its submission to its sovereign power.

Such is the tribute paid by Egypt as vassal state to Turkey. It amounts to the yearly sum of 750,000 pounds sterling (18 million francs). See, with regard to the present status of Egypt, Bonfils, *Droit intern.*, § 189, and the authors cited by him. Also Oppenheim, *Int. law*, 2d ed., pp. 142, 164. [Great Britain declared Egypt to be a protectorate on December 18, 1914—Transl.]

#### PROTECTED STATES

116. A state which is not in the same condition of culture as civilized states, or which, owing to its weakness, does not possess sufficient means to protect its rights in its relations with other states, may place itself under the protection of a more powerful state and consent to be represented by that state in international affairs in acts within the domain of international law.

Treaties establishing a protectorate have become numerous in our time. Germany, Great Britain and France are foremost with regard to protectorates established in Africa, over several islands in Oceanica and in other regions. Cf. Bonfils, *Droit int.*, §§ 182 *et seq.*, and the full bibliography there cited.

117. The relation of protectorate can be established only by express consent and when such consent exists, the legal authority of the protected state as regards the exercise of sovereign powers in international relations cannot be limited except by the clauses of the treaty establishing the protectorate, which cannot be given a broad or liberal interpretation.

118. When, under the clauses of the treaty of protection, the protected state is deprived not only of legal capacity *de jure* and *de facto* in its international relations, but is, besides, subject to the protecting state in the exercise of its sovereign powers at home,

the condition thus arising constitutes a veritable annexation under the form of a protectorate.

119. A protectorate, although established by treaty, can be considered valid by other states only from the time of its due notification to each of them by the government assuming the protectorate, and upon their acquiescence therein.

This rule was established by the treaty of Berlin of February 26, 1885, of which article 34 reads as follows: ". . . a power which assumes a protectorate there, shall accompany the respective act with a notification thereof addressed to the other signatory powers of the present act, in order to enable them if need be to make good any claims of their own."

120. It is incumbent upon the state which has assumed the protectorate to assure the protected territories freedom of international commerce and to establish therein a force invested with sufficient authority to induce respect for international law.

This rule is based on the rule sanctioned in article 35 of the above-mentioned treaty of Berlin, which reads: "The signatory powers of the present act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon."

This rule providing for the occupation of the coast of Africa should in our opinion, as we have already said, include the protectorate. See Fiore, *Diritto internaz. pubblico*, v. II, 4th ed., Appendix, p. 628.

121. The legal status resulting from the protectorate is exceptional and may be likened to that of a minor under guardianship or to a person *alieni juris* for incompetence. This condition may last as long as do the circumstances which gave rise to it.

122. The protecting state cannot, by virtue of a stipulation of established and accepted protectorate take advantage of the absolute right to compel the protected state, by force, to remain subject to its protection.

The relation of protectorate introduced in modern times constitutes a veritable anomaly, like suzerainty and vassalage. As a matter of fact, the protectorate creates an abnormal situation between a stronger state and a weaker one. One guarantees existence to the other and the more or less limited exercise of sovereign powers at home, while the other agrees, in all matters relating to its international life and relations with other states, to be subject to the sovereignty of its protector. Thus, a dualism is established with regard to the sovereignty of the protected state which, from a certain point of view, subsists and from another, is annihilated or at least subordinated to a foreign sovereignty. As sovereignty tends naturally toward unity, it is quite

evident that the relation of protectorate cannot last forever, but is destined to disappear, either through the complete annexation of the protected state, or through its emancipation.

The protectorate of France over the island of Madagascar, by virtue of the treaty concluded December 17, 1885 with the queen of the Hovas, resulted finally in the annexation of the island, which was proclaimed a French colony by the law of August 6, 1896.

**123.** Armed conflict between the protected and the protecting states to break off the relation of protectorate should be subject to the rules of the following title which apply to any form of warlike contest within a state involving political questions of public concern.

## TITLE IV

### TRANSFORMATIONS OF THE PERSONALITY OF THE STATE

#### CIVIL WAR

**124.** Any form of armed internal struggle by persons subject to the authority of the same sovereign constitutes civil war, when these persons, militarily organized and observing the laws of war, engage in hostilities to settle a question of public law.

**125.** Civil war must, in principle, be subject to the internal laws of each state; but so far as its exterior effects are concerned, it may be governed by international law.

The character of civil war may be assigned to armed conflict between citizens of a state militarily organized and the forces of the government, for the purpose of changing the political constitution of the state. The same character is attributed to armed conflict between two countries which by virtue of an agreement of union, are subject to the same ruler, either in the relation of real subordination which binds vassal or semi-sovereign states together or the relation of real union which brings together incorporate states, or that of federal union which unites confederated states or states constituted as a federative empire. Provided that such states have a single international personality and that their struggle tends to disrupt the union, the contest should be considered as civil war. Consequently, to mention instances in modern times, we should not only consider as civil wars the armed struggles in Portugal between the partisans of Queen Dona Maria and those of Don Miguel, and in Spain between the partisans of Isabella II and those of Don Carlos, but we must also consider as such the war of secession in the United States of America (1860-1865) and the wars of independence between colonies and their mother country, and more particularly, those between Cuba and Spain (cf. Calvo, *Droit international*, v. I, §§ 84 *et seq.*, v. IV, §§ 1882 *et seq.*; and Rivier, *op. cit.*, v. I, pp. 83 *et seq.*, v. II, pp. 213 *et seq.*; Pradier-Fodéré, *Traité de droit international public*, v. I, § 378).

**126.** A neutral power may or may not recognize the insurgents as belligerents; but this recognition cannot prevent the government of the state from considering and treating them as rebels, until the armed struggle really assumes the obvious character of civil war, when it is no longer possible justly to deny the application of the laws which must govern war. (Cf. rule 128.)



## SEPARATION FROM A CONSTITUTED STATE

**127.** The people who constitute part of a state may separate from it and form an autonomous and independent state. They may claim this right for themselves by all means legitimate according to public internal law and international law.

**128.** The government established by virtue of the political constitution or agreement of union may treat those concerned in the separation as rebels and apply the municipal law to them. Nevertheless, when they succeed in obtaining military organization or in occupying a part of the territory of the state by armed force, and maintain a sufficient force to wage war against the army of the government and comply with the laws of war, they may demand that international law be applied to them.

It is extremely difficult in this matter to lay down precise rules for determining when the criminal law should be applied to the insurgents and when they must be treated as belligerents governed by international law. Everything depends on the circumstances, length and extent of the insurrection and on the means at the disposal of the insurgents to enable them to win. When the insurrection, by reason of its importance, can be called the result of the collective will of so large a number of people that they all but form the majority, and when the insurgent party, owing to the elements of strength at its disposal, succeeds in avoiding all measures of repressive justice, such an exceptional condition must be considered as a fact subject to international rather than municipal law.

The government of the United States displayed political wisdom in treating as enemies the states which, from 1860 to 1865, fought to secede from the Union, and by applying to them the laws of war, instead of the provisions of the criminal law punishing acts of rebellion.

**129.** The recognition or non-recognition of insurgents as belligerents must be left to the judgment of each of the neutral powers. Nevertheless, aside from such recognition, the insurgents cannot in international relations be considered as malefactors or freebooters, but the acts performed by them in the course of the armed conflict must be deemed acts of war, if they abide by the rules of international law and the customs accepted by civilized people with regard to ordinary war.

In the application of this rule, it is necessary to point out that, even though the belligerency of the revolutionary party had not been duly recognized, the seizure of the property of the enemy in conformity with the usages of war could not be considered as an act of piracy. It would not be possible, therefore, in such a case, to apply the rules of international law relating to piracy, which we shall set forth hereafter.

## WARS OF SECESSION FROM THE POINT OF VIEW OF PERSONALITY

130. Conflict between the seceding party and the state does not *ipso facto* modify the personality of the states. If, however, the seceders succeed in establishing a government which in fact exercises sovereign functions in an autonomous and independent manner and maintains sufficient means to support itself, the personality of the state may be considered as divided into two parts.

131. The division of a state into two or more states becomes effective and final in its effect on international relations, only after the failure of the means resorted to by the government of the state to restore its authority over the seceding parts, and the effective and permanent character of the new state formed by the seceding subdivisions or provinces has been ascertained.

## RELATIONS BETWEEN THE NEW STATE AND OTHER STATES

132. A new state constituted as a result of secession can establish international relations as an autonomous and independent state only with the states which have recognized it.

Aside, however, from recognition, such acts as are accomplished by the government established during the war are considered acts of government, and with respect to their international consequences, the rules governing the acts of a belligerent power during military occupation should be applied.

This rule is based on the general principle that in international relations he who *de facto regit* must be deemed sovereign.

133. Treaties concluded by the original state from which the provinces or countries seceded do not continue to apply to the new state established as a result of the secession.

The English, Spanish and Portuguese colonies which separated from the mother country and formed independent states were considered as distinct and autonomous persons. Consequently, the treaties concluded by the mother countries were not considered binding upon these new states. Cf. Bonfil, *Droit intern.*, §§ 100-101.

134. The obligations incumbent upon the old state and upon the new state formed as a result of the secession, in so far as concerns the public debt and engagements to private individuals contracted

by the state prior to the secession, are to be governed by the convention expressly concluded between the old and the new state.

In the absence of such convention, the rules governing these legal relations in case of cession must by analogy be applied.

#### RESTORATION

**135.** In case of restoration, the sovereign of the state recovers entirely the exercise of his sovereign rights with regard to the regions occupied by the seceding insurgents, just as if there had been no interruption or discontinuance, with the qualification, however, of observing rights acquired by neutrals during the conflict or interregnum up to the day of the restoration.

**136.** The restored ruler cannot be permitted to make use of his sovereign rights retroactively, or to disavow the acts of the government instituted by the seceding insurgents, provided, however, that such government has fulfilled its duties without violating international law.

This rule is based on the idea that in relations of public municipal law, the person holding *de facto* the sovereign power may exercise all the rights and functions of the government and compel private individuals, citizens and foreigners, to recognize the force of his command and the authority of his acts.

#### A STATE FORMED BY THE UNION OF SEVERAL STATES

**137.** When several states unite to form a new one, the result is the extinction in fact and in law of the right of personality of each of the states and the birth of the international personality of the new state arising out of the union.

**138.** The new state thus established must be considered the successor in entirety of the several united states in all that relates to obligations toward private individuals as well as toward third powers, and in these matters the rules governing such relations in case of annexation should be applied.

**139.** Treaties concluded by each of the states shall not be deemed binding as of right upon the state formed by their union. Nevertheless, such treaties as are compatible with the political constitution and public law of the new state may be considered binding until, within the shortest time possible, they shall be renewed.

## COMPLETE ANNEXATION OF THE STATE

140. Complete annexation takes place when an autonomous and independent state is either of its own free will or by force incorporated in another state.

141. The state which by reason of its voluntary or forcible incorporation becomes an integral part of the annexing state loses its international personality, which is absorbed in that of the state which effects the complete annexation.

142. Annexation ends *ipso jure ipsoque facto* the exercise by the annexed state of every sovereign right in international relations. It also ends any personal duty on the part of such state as regards the fulfillment of the international obligations assumed before the annexation. The state for whose aggrandizement the annexation was undertaken succeeds to the annexed state in that respect.

The rule must be applied to the rights and obligations which had attached to the sovereign state before it ceased to exist. The idea of succession to rights and duties applicable in so far as it is possible in relations of public and private law in the case of cession of a part of the territory of a state, is applicable with still more reason when the state ceases to exist in consequence of total annexation, or when several states cease to exist by reason of their fusion into a single state. International personality undoubtedly disappears; but as neither the territory nor the population disappear, so the territorial and economic personality of the extinct state does not disappear. Consequently it must be admitted that all rights and duties are transferred to its successor, which continues the economic and corporate personality of the state.

At the time of the annexation of Hanover, Electoral Hesse, the Duchy of Nassau and the city of Frankfort-a-Main, Prussia, by the law of September 22, 1866, declared itself responsible for the debts and all international obligations of these states.

143. Treaties concluded by the annexing state must be *ipso jure ipsoque facto* considered as extending to the annexed state.

Treaties concluded by the annexed state resulting in an international servitude established for the advantage of third powers, should be respected.

Treaties resulting in reciprocal advantages and obligations between the annexed state and another state, may be enforced if the annexing state intends to take advantage of them, by limiting them to the territory of the annexed state, and if there is no opposition from the state which signed them.

The first part of this rule is based on the theory that except in the case of express declaration to the contrary, treaties are concluded to be applied to all the territory of the state and that, in principle, the possibility of the territorial extension of the states with which they are concluded must be contemplated.

The second part is founded on the general principles: *Res transit cum onere suo*;—*Nemo plus juris transferre potest quam ipse habet*. Consequently, if the annexed state, for example, has concluded a treaty limiting its right to rebuild or erect fortifications on its boundaries, or creating an international servitude, these treaties must be respected by the annexing state.

With regard to the third part of the rule, it should be observed that it is not possible to maintain absolutely that all treaties must be annulled by reason of the disappearance of the subject of the international obligation. On the contrary, it must be admitted that the treaties concluded by the extinguished state from which those rights proceed must be respected by the annexing state, so long as they have not been expressly revoked. Consequently, treaties of extradition, alliance and similar treaties connected with the exercise of sovereign rights must be annulled. But it would not be possible to annul *ipso jure ipsoque facto*, treaties relating to boundaries, navigable canals and thoroughfares. With regard to treaties of commerce, in so far as they relate to private rights, if the period of time fixed for their denunciation has not expired, the annexing state must respect them. But as to those treaties which relate to the exercise of sovereign rights, as for example, the exercise of consular functions in the respective territories and the rules agreed upon for the execution of judgments, these acts must be considered as having been annulled by reason of the cessation of the sovereign rights in international relations.

When the state of Texas ceased to exist by reason of its annexation to the United States, France and Great Britain, through their ministers, notified the government of Texas that the treaties of commerce previously concluded should be considered as still in force and the fulfillment of the financial obligations contracted by that government should be still binding. (Lawrence, *Commentaire*, v. I, p. 210.)

**144.** With regard to the payment of the public debt, the respect of rights acquired by private individuals and public officers and every sort of financial obligation, the annexing state must undoubtedly be considered as a successor in entirety.

At the time of the annexation of Texas to the United States, President Tyler said in his message: "We cannot honorably take the lands without assuming the payment of all the debts with which they are encumbered."

**145.** When a state ceases to exist because of annexation to several states, the succession both in rights and obligations shall be distributed proportionately among the annexing states. The proportion shall be determined by taking into account the total amount of personal and real taxes collected from the inhabitants and real estate of the annexed territory.

For the apportionment of the state domain to the different

annexing states, the same rules shall apply as in the case of cession.

**146.** The property obligations assumed by the extinguished state must be fulfilled by the successor state, and it is the latter's duty to respect the rights acquired by private individuals with regard to the state's property, provided that such rights are perfect rights and not mere options or reversions.

## TITLE V

### CESSION OF TERRITORY AND RESULTING ANNEXATION

147. The cession of a portion of territory made by the state to which it belongs to the state acquiring and annexing it to its own territory, may take place voluntarily, by sale, exchange or gift, or forcibly as the result of war. The cession must be regulated by a treaty concluded in conformity with the rules of international law and the public law of the two contracting parties.

There are numerous examples of cessions, sanctioned by treaties, for an agreed sum. Such was the case of Louisiana sold by the First Consul to the United States under the provisions of the treaty of Paris of 1803, and that of Russian America also ceded to the United States in 1867 for \$7,200,000. See other examples in Calvo, §§ 290 *et seq.*; Rivier, v. I, pp. 197 *et seq.*

Forced cessions imposed as conditions of peace have usually been the result of war. Thus, Prussia was compelled to give up certain territory at the peace of Tilsit in 1807; likewise France, after the wars of 1814-1815 and the war of 1870. Austria was obliged to cede Lombardy to Italy after the war of 1859 and Venice after the war of 1866.

148. The consent of the inhabitants of the ceded territory cannot be considered necessary to render the cession effective. Nevertheless, it is considered advisable in order to prevent opposition to urge the representatives of the ceded state to vote.

The territory of a state cannot possibly be considered as the property of the prince. Still less may the inhabitants be considered as accessories of the territory they occupy. Accordingly, certain authors have held that the assent of the populations of ceded countries should be held indispensable for the effectualness of the cession. Nevertheless, the majority now agree that as territorial cessions always take place for reasons of public interest, their effectualness cannot be subordinated to the formality of the plebiscite.

Thiers spoke as follows in the Legislative Assembly on March 18, 1867: "The new principle of the assent of the people is an arbitrary one very often misleading and at bottom only a principle of confusion when it is sought to be applied."

Every matter of public interest must as a rule be subject to the approval of the whole; it is sufficient, however, if the representative bodies of the ceding state recognize the public necessity or advantage of effecting the cession.

Compare Fiore, *Diritto internazionale pubblico*, v. II, 4th ed., § 1123;

Rouard De Card, *Les annexions et les plébiscites dans l'histoire contemporaine*; Lodijenski, *Des plébiscites en droit international*, 1883.

The formality of the plebiscite is sanctioned in several treaties. See article I of the treaty of Turin of March 24, 1860, for the cession of Nice and Savoy. It is also mentioned as a condition in the treaty of Vienna of August 23, 1866, between Austria and Prussia (art. 5); but that provision was modified by the convention of October 11, 1878.

The clause most in conformity with rational principles is that of the treaty of August 10, 1877, between Sweden and France for the retrocession of the island of Saint-Barthélemy, which reads as follows: "His Majesty the king of Sweden and Norway recedes the island of Saint-Bartholomew to France and consequently renounces for himself and all his descendants and successors the rights and titles over the said colony. This retrocession is made with the express reservation of the assent of the people of Saint Bartholomew."

The treaty of peace signed at Versailles February 24, 1871, stipulates in article I: "France renounces in favor of the German Empire all her rights over the territories situated to the east of the boundary hereafter designated. . . ."

"The German Empire shall possess these territories in perpetuity in full sovereignty and dominion."

149. It is incumbent, however, on the contracting parties to allow every one full liberty to retain his citizenship in the ceding state or to acquire that of the transferee, by giving substantial guaranties for the free and spontaneous exercise of that right.

In the treaty of May 30, 1814 (art. 17), a term of six years was given to the inhabitants to dispose of their property and to withdraw to the country of their choice.

The right of election of nationality has been admitted in favor of the inhabitants of, and persons born in, the ceded territories; but it has not always been clothed with sufficient guaranties for insuring its free exercise. See treaty of Paris of 1856, art. 21; of Zurich, November 10, 1859, art. 12; of Turin, March 24, 1860, art. 6. Compare the critical observations of the conditions established for the exercise of that right in Fiore, *Diritto internazionale privato*, 4th ed., v. I, §§ 386 *et seq.*

150. Cession and annexation are considered complete from the day the transferee takes possession of the ceded territory.

So long as the cession has not become effective by means of actual occupation, it cannot be said that the territorial government is, by virtue of the treaty, established in the ceded territory with all the rights attaching thereto.

The transferee can only demand that the treaty of cession be fully executed.

The signing of the treaty cannot be deemed sufficient to make the cession complete, with all the consequences that may arise therefrom. If, by virtue of the laws of the ceding state or those of the transferee, exchanges or changes in territorial possessions had necessarily to be approved by the legislative



bodies, as is the case for example under the terms of article 5 of the Italian law, every consequence arising out of the treaty of cession would necessarily have to be subject to the approval of Parliament.

#### EFFECTS OF CESSION AND ANNEXATION

**151.** The cession of a portion of territory to the state annexing it does not modify either the personality of the transferor or transferee but only the exercise of their respective rights of sovereignty.

**152.** As soon as the cession becomes effective, it implies on the part of the ceding state the renunciation of the exercise of every right of sovereignty over the ceded territory and its inhabitants.

Usually, formal renunciation of all sovereign rights is specially stipulated. In the treaty of Vienna of June 9, 1815, the following clause was invariably inserted in the case of all the cessions subscribed to: "renounces in perpetuity, for himself and his heirs and successors, all rights over the said provinces, etc., in favor of His Majesty. . . ."

**153.** After the annexation of the ceded territory is accomplished by the transferee, the public and constitutional law of that state must be considered as extending to the annexed territory without further declaration.

Compare Court of Turin, 24 Messidor year XIII, *Journ. du Palais* and note; Cass. française, July 6, 1833, Sirey, 1834, I, 338.

Taking possession by the transferee must be considered as accomplished without any further formality when the treaty is executed and when that state has, in any manner whatever, actually exercised its rights over the ceded territory. Ordinarily, certain formalities which have to be observed by the two contracting parties to make the act valid, are indicated in the treaty. The publication of the treaty or a manifesto or proclamation addressed to the inhabitants of the ceded territory is always considered indispensable.

**154.** International treaties and every right of the state with regard to its territorial possessions must be considered as extending fully to the annexed territory.

On the other hand, international treaties concluded by the ceding state cease to be applicable to it. In like manner the exercise of every international right by the former sovereign ceases *ipso jure ipsoque facto* with regard to the ceded territories, unless the treaty of cession otherwise provides.

The Court of Aix sanctioned the first part of our rule in its decision of November 8, 1875 (Sirey, 1876, II, 134).

German courts have held that the Franco-Swiss convention of June 15, 1869, could not be considered in force in Alsace-Lorraine. Court of Mülhausen, October 31, 1885, and superior court of Colmar, April 2, 1886. (*Journ. des Trib. de Lausanne*, June 25, 1886.)

155. With regard to third powers, the foregoing rule, so far as the binding force of treaties is concerned, must be subject to their previous recognition of the cession.

Nevertheless, the respective rights belonging to the transferor and transferee states over their respective territorial possessions cannot be disputed, even as regards the consequences of these rights in the international relations of the states.

The first part of this rule is based on the just idea that the cession agreed upon between two or more states pursuant to a treaty which is valid in the relations of the parties without recognition of third powers, may, however, be considered by such powers as *res inter alios acta*, in so far as the said cession may violate rights acquired under treaties concluded with the ceding state with respect to the ceded territory. Accordingly, it must be admitted that third powers, although not qualified to validate the cession or to subordinate its effectiveness as between the parties to their own previous recognition, may, however, safeguard their rights acquired over the ceded territory by subordinating their recognition of the new state of affairs to the condition of obtaining recognition for these rights by the transferee. Let us suppose, for instance, that a state has acquired by treaty certain commercial privileges in the ports of the ceded territory, or the right to coastwise trade, or of fishing within territorial waters. It could not reasonably be maintained that such state ought to be deprived of these contractual rights. (Compare the last part of the note to rule 143.)

The second part of the rule is based upon the general idea that in international relations, territorial sovereignty must always be conceded to the *de facto* sovereign.

156. The effects flowing from the cession with particular regard to the obligations contracted by the ceding government with respect to the ceded territory, the enjoyment of property rights in the public domain, the rights acquired by public officers, the fulfilment of obligations toward private individuals and contribution to the payment of the public debt, must as a rule be regulated by the treaty of cession.

157. For all matters not regulated by express stipulation, the transferee must be deemed to assume the position of universal successor with regard to rights and obligations connected with the exercise of public power or arising out of contracts executed by the government of the ceding state, on grounds of public utility, with respect to the ceded territory.

The principles governing universal succession according to the civil law may be applied by analogy to the case of state succession, with proper reservations.

On principle, it must be admitted that the territory with all its accessories and with everything belonging to the public domain, passes to the transferee, who is entitled to enjoy all the advantages connected with the territorial possessions acquired, without having to pay any compensation to the ceding state except as expressly stipulated. Thus, if there existed in the ceded territory a public institution or a charitable organization for the benefit of all the inhabitants of the ceding state, and if no indemnity had been demanded to provide for the burdens thus imposed on the ceding state, which would have to undertake new expenditures to provide for the needs of its citizens, no indemnity could be claimed in the absence of express stipulation.

Compare, Court of Cassation of Palermo, January 7, 1868 (*Gazzetta dei Tribunali*, 1868, 257) and January 15, 1871 (*Giurisprudenza*, v. VIII, 616). See article 8 of the treaty of peace between Austria and Italy of October 3, 1866.

As regards debts, it must be said that the personality of the ceding state remains complete notwithstanding the cession of a part of its territory. Hence it follows that it must remain responsible for the obligations it has contracted, although originally connected with the ceded territory, whenever by reason of their nature and object they are considered as property (real) obligations in the interest of the ceding state. Thus, for instance, the obligations assumed for works of defense built by the ceding state on the ceded territory and the indemnities due by it to private individuals could not be charged to the transferee unless expressly stipulated in the treaty. Inasmuch as the personality of the ceding state remains intact and complete, the obligations incidental to the general interests of that state, even though they may be the consequence of acts connected with the ceded territory, could not be charged to the transferee.

On the other hand, obligations assumed by the ceding state for an object of public utility relating to the ceded territory, must naturally pass to the transferee, as a debt assumed by a successor. This would be the case when, by reason of the erection of a public building on the ceded territory, which naturally would pass with the territory to the transferee, the ceding state may have concluded a building contract or proceeded to expropriate private property for which it would have to pay compensation.

The treaty of Vienna of October 3, 1866, sanctions this rule expressly in article 8, which reads: "The government of His Majesty, the King of Italy, succeeds to the rights and obligations arising out of contracts regularly concluded by the Austrian government for objects of public interest especially concerning the ceded country." See the same clause in the treaty of Vienna of October 30, 1864, between Austria, Prussia and Denmark, art. 17.

Compare Fiore, *Diritto internazionale pubblico*, 4th ed., v. I, §§ 129 et seq.; Phillimore, *Intern. law*, v. I, § 137; Bluntschli, *Droit intern. codifié*, §§ 66-67; Field, *International code*, art. 24; Fusinato, in *Enciclopedia giuridica italiana*, V°, Annessione.

**158.** It is incumbent on the transferee to assume the payment of a part of the public debt in proportion to the importance of the ceded territory.

Moreover, it should assume the exclusive burden of the debts contracted in the public interest of the ceded territory.

See the treaty of Zurich of November 10, 1859, between Austria, France and Sardinia, art. 5; the treaty of Vienna of October 30, 1864, between Austria, Prussia and Denmark, art. 17; the treaty of Berlin of July 13, 1878, articles 9, 33 and 42.

The second part of this rule ought to be applied especially when the ceding state has contracted a loan to erect a building on the ceded territory. It ought to be applied with still more reason when the loan was for the building of a railroad across such territory.

**159.** The transferee is bound to respect the rights acquired by individuals in the ceded territory, and also those acquired by public officers in virtue of the exercise of their functions in the ceded territory.

This rule is applicable to the rights that may be acquired according to the principles of common law, but is not applicable either to prospective rights or to privileges based on misuse or on the implied consent of the ceding state. As regards the rights acquired by public officers exercising their functions on the ceded territory, their case is usually provided for in the treaties of cession. There is such a provision in the treaty of Vienna of October 3, 1866, article 17: "Pensions, military as well as civil, regularly liquidated, which were in the custody of the public treasury of the Lombard-Venetian Kingdom, shall continue to be payable to the incumbents and if need be, to their widows and children, and shall be paid from now on by the government of His Italian Majesty."

Nevertheless, even when the treaty is silent, it is always considered in conformity with the principles of justice to take account of the rights acquired by public officers and to have the transferee pay them their pensions when the said officers have exercised their duties in the ceded territory.

**160.** The liabilities included in the budget of the ceding state shall be justly divided so that a part will be assigned to the successor, taking into account the intention and object of such assignment and taking as a basis of the apportionment the economic importance and the amount of taxes of the ceded territory.

The expenses of the ceding state to provide for the exigencies of public service and administration must continue to be borne, because the cession has not modified its personality. It must be considered, however, that the assets of the ceding state's budget undergo a diminution in proportion to the importance of the ceded territory. It is therefore fair, if not just, that the succeeding state bear a part of the financial obligations.

At the time of the cession of Alsace-Lorraine, it was stipulated in the additional convention of December 11, 1871: "The German Empire recognizes and holds itself responsible for the civil and ecclesiastical pensions regularly obtaining and liquidated on the 2d of March, 1871 (date of ratification of the preliminaries of peace) in the name either of individuals born in the

ceded territories or of their widows and orphans, provided that the persons enjoying such pensions reside in the territory of the German Empire."

**161.** When the treaty does not provide for it, the difficulties relating to the just apportionment of the public debt between the transferor and transferee and those relating to the execution of the clauses of the treaty on this matter must be referred to a mixed commission, observing the rules of procedure used in case of arbitration.

Concerning the difficulties which may arise from cession or annexation, see: Seloese, *Traité de l'annexion au territoire français ou de son démembrement*, 1880; Cabonat, *Des annexions de territoire et de leurs principales conséquences*, 1881; Appleton, *Des effets des annexions de territoires sur les dettes de l'Etat démembré ou annexé*, 1895; Katibian, *Conséquences juridiques des transformations territoriales des Etats sur les traités*; Fusinato, *Cessione, Annessione e loro effetti giuridici*, in *l'Enciclopedia italiana*, 1890; Corsi, *Trasmissione degli obblighi patrimoniali degli stati in caso di mutazioni territoriali*, 1895; Calvo, *Droit intern.*, v. I, §§ 263-298; Bonfils, *Droit intern.*, §§ 214 et seq.; Pradier-Fodéré, *Droit intern.* v. II, §§ 781, 849; Chrétien, *Droit intern.*, §§ 135-139; Despagnet, *Droit intern.*, § 96; Oppenheim, *International law*, I, 2d ed., pp. 285-291.

#### ADMINISTRATION AND JUSTICE

**162.** The transferee state must have the power to provide in complete independence for the administration of the annexed countries and the position of administrative officers.

Nevertheless, it is incumbent on the state to exercise this power with moderation and to regulate the status of administrative officers with justice.

In the treaty of Vienna of 1866, this point is regulated in article 15 as follows: "Civil employees born in the Lombard-Venetian Kingdom, shall have the right to choose either to remain in the service of Austria or to enter the Italian service, in which case His Majesty the King of Italy undertakes to give them offices similar to those they enjoyed, or to grant them a pension the amount of which shall be determined by the laws and regulations in force in Austria."

The Italian government has regulated the status of civil employees as follows, by the decree of July 19, 1866: "Without prejudice to special measures, all the employees in the Venetian provinces are, until further orders, confirmed in their offices with the salary attached thereto, except those who may have followed the Austrian army or have left their homes at the approach of the national army, these being considered as having resigned."

**163.** Justice shall be administered and decisions executed in the ceded territory in the name of the transferee or successor state.

Pending cases shall be governed by the law of procedure in force in the successor state, except in the case of rights acquired by the contending parties under proceedings which took place before the cession.

**164.** As regards decisions in civil and criminal cases rendered before the cession, which have not yet acquired the authority of final judgments, the principles of transitory law governing judgments and jurisdictions when a new law is substituted for an old one shall be applied.

The two foregoing rules are the legitimate results of the principle that the cession implies the substitution of one government for the other and that, in all matters relating to public law (in which are included police and penal laws and those relating to actions, jurisdiction and procedure), the legislature of the transferee state comes into power from the time the cession takes effect, excepting in the case of previously acquired rights. The law of the successor state, therefore, so far as the ceded territory is concerned, possesses the same authority as any new law. It is, therefore, natural, as regards all the effects that the new law may have on legal relations derived from actions and proceedings commenced and terminated before the cession, that the rules of transitory law governing the consequences of the taking effect of any new law must be applied.

## TITLE VI

### RECOGNITION OF THE STATE

#### GENERAL RULES

165. Recognition of a state is the solemn act necessary to establish diplomatic relations between states as well as the reciprocal enjoyment and exercise of international rights.

166. While a state may exist as such according to its constitutional law, if it desires in its relations with other states to exercise fully the international rights to which it is entitled and to request the recognition of its international privileges and powers, it must first be recognized by the other state or states.

#### WHEN IS RECOGNITION NECESSARY

167. Recognition is necessary when a new state is formed, either by forced or conventional separation of a part of the old state, by the emancipation of states subject as vassals to a suzerain, by the liberation of a colony from the mother country, or by the union of several states into one.

Recognition may be desirable when a new territory is added to a new state and when it is intended that it should be recognized as an integral part of the territory of such state, or when some change in the political constitution of a state has taken place.

There are, in our times, numerous instances of such an occurrence: Belgium was formed into an autonomous state as a result of its separation from the Netherlands; Greece, Montenegro, Serbia and Rumania, as a result of their emancipation from the vassalage of Turkey; the American republics, as a result of their colonial liberation from Great Britain, Spain and Portugal; and the Kingdom of Italy, formed by the union of the Italian states, etc.

168. A state does not need to be recognized as soon as it is politically constituted in order to be considered a person, even in its international relations, nor in order to be held capable of en-

joying the international rights which it possesses as a state. Yet, the admittance of the new state into international society and the normal and effective exercise of all its international rights must be considered as conditioned upon its entrance into relations with other states, which occurs when each of these powers recognizes it.

To decide whether a new state is or is not politically constituted and to estimate the genuineness of the motives which may have inspired its formation is a question of constitutional law. The existence of a state depends wholly on the will of the people who intended to form the state. The legality of the means is a question of constitutional and not international law. Granted the existence of a new state, the international question to be solved with regard to it is the decision as to whether or not it should be admitted as a member of international society with all the privileges which according to international law belong to every state effectively constituted. Third powers, therefore, are merely called upon to decide whether the political personality of the new political organism is such as to guarantee the exercise and the fulfillment of international rights and duties. Such is the purpose of recognition.

#### NATURE OF RECOGNITION

169. Recognition is in its nature a political act. It is the privilege of every government to determine with perfect freedom and independence whether conditions render desirable or opportune the recognition of a new state, and it need not account for its decision to other governments which may consider its recognition as untimely or tardy.

Great Britain recognized the constitution of the new government at Naples in 1860 while King Francis II was still at Gaète and still hoped to defend his crown with the aid of the military forces at his disposal. The United States, on the contrary, refused to recognize the independence of Hungary in 1849. Great Britain delayed until 1782 the recognition of the United States, which France had recognized in 1778. The states of South America were recognized by Great Britain in 1825, while Spain did not do so until much later, although these states had been in existence since 1810 as a result of their independence from Spanish control. (See Calvo, v. I, § 94.)

170. Recognition may be considered in *good faith* when it takes place after the new political organism has acquired a certain strength, that is to say, when it has at its command the power and the necessary means for exercising the rights and privileges of the state, preserving order, administering justice and assuming responsibility for its own acts.

171. Recognition of a new state may be considered in *bad faith* if it takes place during the course of hostilities between the older



government which seeks by force to restore the old state of affairs, and the actually victorious party which, though it has succeeded in establishing a government, does not yet show sufficient stability.

When France recognized the independence of the United States by concluding with it the treaty of commerce of February 6, 1778, when its struggle with the mother country had not yet ended, Great Britain considered this untimely recognition as a hostile act and recalled its ambassador.

#### VALUE OF RECOGNITION

172. Recognition must be limited to what appears *de facto*, and can never have the effect of an approval of the means used to secure the triumph of the new government nor constitute a declaration of the lawfulness of these means or of the legitimacy of the new order of things.

The legality of the means used for the political constitution of a new state is a matter mainly of constitutional law. No new state can be formed either by separation or emancipation, without violent means, without revolution, without desperate struggle; but all that is in the realm of history. In international law, states must be considered as they have actually been constituted as a consequence of political events. Every political organism having a political personality of its own, a government established by the will of the people, provided with sufficient means to operate as a regular government, and which gives sufficient proof of its stability and fitness to exercise its own rights in international society and to assume responsibility for its acts, may be recognized without the necessity of having to consider the means resorted to in the formation of the new state.

173. Recognition of a new state cannot be regarded as a hostile act toward the country of which it was formerly a part, and cannot be considered as a just ground for complaint, except in cases where, owing to special circumstances, such recognition might be tantamount to moral assistance given to the new state.

174. The unjustifiable refusal to recognize as an autonomous and independent state one constituted *de facto*, must be considered as contrary to international law and may justify acts of retorsion.

It should be considered as good policy not to postpone the recognition of a state which has in fact become independent. No attention need be paid the old government which may make every effort to prevent third parties from recognizing the new state and to restore its own complete sovereignty. A tardy refusal, therefore, may no doubt justify acts of retorsion.

At the time of the formation of the Italian Kingdom, certain states of Germany having persisted in their refusal of recognition, Count Cavour withdrew the exequatur from the consuls of these states on Sardinian territory, which act of retorsion brought about the desired result.

**175.** The recognition of a new state by a congress should be considered as final in granting the effective enjoyment of international rights to such a state, not only as regards the powers assembled in Congress and those which have adhered to its decisions, but also to legalize the new order of things with regard to the state whose interest it may be not to extend recognition.

The final separation of Belgium from Holland was recognized by the five great powers under the terms of the treaty of London of January 26, 1831. The independence of Greece was recognized at the Conference of Constantinople of 1832; that of the new states of Rumania, Servia and Montenegro, at the Congress of Berlin, 1878. The new state of Congo was recognized at the Conference of Berlin, 1885.

**176.** A state whose rights are impaired by the formation of a new state cannot refuse for an indefinite period to recognize the new conditions.

Recognition on its part should be considered as effecting a final renunciation of any design to restore the old conditions.

It is but natural for the injured state to decide slowly upon recognition of the new conditions. Not until September 24, 1782, did Great Britain recognize the independence of the United States, established in 1776. Spain decided still more slowly to recognize as states its former American colonies, the independence of which dated back to 1810. It recognized Chile in 1844, Venezuela in 1846 and Nicaragua in 1850. Undoubtedly, recognition by the injured state must be considered as most important in demonstrating its final acquiescence and consequently the end of any contest. But no time can be fixed to compel that state to effect its recognition. Economic, commercial and political interests are always the most efficacious motives, and it behooves the old state to bear them in mind.

#### RECOGNITION OF CONSTITUTIONAL CHANGES

**177.** Recognition in the event of a change in the political constitution of a state may be required in order to maintain diplomatic relations with the new government of that state.

**178.** The government of every state has the right to maintain or to suspend its relations with a new government established in accordance with the new political constitution, and may exercise the right freely.

**179.** It is good policy to consider the form of government as of no import to international society. A sovereign may, however, refuse to recognize a new government which proclaims principles subversive and contrary to the fundamental laws of international

society, or which impairs, in one way or another, the authority of the principles of common law indispensable for the preservation of the legal community among the states.

#### FORM OF RECOGNITION

**180.** No particular formality is required to recognize a new state or government. The fact of establishing diplomatic relations with it is equivalent to a formal recognition.

The formal recognition of a new state or government may take place in different ways. The appointment of consular agents, the conclusion of an international convention, the admission of a new state as such to the provisions of a treaty with other states, and other similar acts of a nature proving the establishment of diplomatic relations may be equivalent to a formal act of recognition.

#### EXERCISE OF ITS RIGHTS BY A STATE NOT RECOGNIZED

**181.** Every state may freely exercise its rights of sovereignty within its own territory independently of recognition, and foreign officials and courts cannot ignore the entirely legal authority of the sovereign acts thus undertaken.

Since a constituted authority must be considered as invested with all rights of sovereignty as soon as the people have established or accepted a government which exercises *de facto* all sovereign powers, it follows that the exercise of those rights must be given effect in foreign countries independently of recognition.

The Supreme Court of the United States declared in 1808 that the sovereign rights of the United States were to be considered as complete from the day of the declaration of their independence, that is to say, from the 4th of July, 1776, independently of their recognition by Great Britain in the treaty of 1782.

The Court of Cassation of Turin has held with reason that a private person who has paid to the old government annuities due to the territorial sovereign, cannot be exempted on the ground of lack of recognition of the new government and of his good faith. The rights of sovereignty, said the court, belong in effect, in their entirety, to the *de facto* government. (*Cass. Turin*, July 1, 1869, *Giurisprudenza*, 1869, 526.)

**182.** The acts of government of a new state, so far as their operative effect in international relations is concerned, may be deemed as of no value in a state which has not recognized it. Consequently, the courts and political authorities of the latter country may consider the former conditions as still existing, until their government recognizes the new state.

Although a state, independently of its recognition, must be considered in legal possession of its internal sovereign rights from the time it is politically constituted, it cannot be held that its acts, in so far as they are intended to regulate international relations or be effective abroad, must be considered valid, as regards another state which has not recognized it.

Let us suppose, for instance, that the new government has, by new laws, modified public external law by changing, say, the rules relating to the extradition of criminals or the execution of foreign judgments. Let us suppose it has, for instance, declared valid a decision of its own courts which has annulled a marriage by granting a divorce under application of its own law. The courts of justice and authorities of a foreign country which had not recognized the new state could disregard these laws so far as their extraterritorial effect is concerned, and could indeed consider the former conditions as still in force. (Compare Phillimore, *International law*, v. II, chap. IV, § 22, p. 33; Calvo, *Droit international*, §§ 99 *et seq.*)

In order to make our rule clearer, let it be supposed that under the law of a given state, every act directed against a foreign ruler is punished and that a newly organized state, not yet recognized, issues a loan for the purpose of strengthening its position and of repelling the attack of the dispossessed sovereign. Let it furthermore be supposed that a citizen of that state, considering the government of the new state as legally constituted, lends it a large sum of money, and the question arises as to whether such an act comes within the criminal law of his country. Under such circumstances, the loan, as a commercial transaction, could not be considered as a hostile act calling for punishment; but, as a matter of fact, it could be regarded as assistance given to the ruler not yet recognized, against the dispossessed sovereign. Therefore, it must be admitted that the courts of the state which has not recognized the new state should take account of penal sanctions and deem international relations unchanged.

## TITLE VII

### IDENTITY AND LOSS OF PERSONALITY OF THE STATE

**183.** The personality of the state must be considered as unchanged and subsisting with all the rights and privileges appertaining thereto, so long as the state preserves its substantial characteristics as a political institution.

**184.** A state loses its personality when it ceases to constitute an independent political association.

This may be the result of:

- a.* Its voluntary incorporation into another state;
- b.* The voluntary union of several states, forming a new and more important one;
- c.* Forcible incorporation into another state, by conquest or subjection rendered legal in conformity with international law.

## TITLE VIII

### RIGHTS OF LIBERTY AND AUTONOMY

#### LIBERTY

**185.** Liberty, a right possessed by every state in its relations with other states, is the legal power to act with independence and without external hindrance within the sphere of its own right.

**186.** Each state may claim only the liberty and independence compatible with the respect for the rights of the other states of the *Magna civitas*, all being subject to the exigencies of a well-regulated common existence.

**187.** Each state, in its relations with other states, must so exercise its liberty as not to infringe upon the rights and legitimate interests of the others, and not to violate directly or indirectly the private rights of foreigners.

**188.** Every government, independently of the obligations contracted by treaties, must, in exercising its rights, be considered bound to take into account the general interests of international society and the requirements of common life with other states.

#### AUTONOMY

**189.** Autonomy is the right of every state to establish and modify its political constitution and to exercise freely and fully over its own territory all the powers and functions of sovereignty without violating international law, free from any direct or indirect interference by other states in all matters relating to internal public law.

**190.** It should be presumed, in principle, that every state enjoys complete and indivisible autonomy. The state may, however, by treaty, consent to certain limitations upon the exercise of its sovereign powers, provided that such limitations be stipulated in clear, precise and unequivocal language and be not contrary to the principles of international law.

**191.** Every state may, with full autonomy, provide for its preservation, well-being and development, and its liberty in that respect cannot be limited by fear of any possible danger which may arise from the continued and progressive increase of its economic, intellectual and moral power attained without injury to the rights of others.

**192.** Every government may provide with full autonomy for the defense of the state by organizing its army and navy, building fortifications, concluding alliances, and adopting all necessary measures to that end, without being subjected either to limitations or prohibitions of any kind by foreign governments.

**193.** Nevertheless, the right of every state to increase its military power should always be exercised within just limits established by common or general law, as will be explained hereafter, and should not be so extended as to jeopardize the safety of third parties.

This rule is based on the idea of limiting armaments according to the rules to be laid down hereafter. It is in effect inadmissible that a state, by reason of its liberty, may without just reasons increase inordinately its land and sea forces and thus augment the enormous cost of armaments by forcing the other states to increase their military forces in order to preserve peace.

Exaggerated armaments may always be considered as injurious to common interests and may constitute just grounds for demanding explanations, especially when it may be presumed that they are directed against a certain state.

#### AUTONOMY OF LEGISLATIVE POWER

**194.** Every government may, with absolutely complete autonomy, enact and amend its laws and subject to the laws persons, property, legal acts and facts, under the condition, however, that it exercise its power within its legal sphere and do not violate international law.

#### JUST LIMITATIONS OF LEGISLATIVE AUTONOMY

**195.** It is not permissible, under the guise of legislative autonomy to subject foreigners to territorial laws which concern their personal status, nor to refuse recognition to the personal status of these foreigners, except where such non-recognition aims to maintain the authority of the laws of public policy or those protecting morals or social order.

196. Any system of law which attributes the character of a real statute to every provision relating to real property and which subjects to territorial law every legal relation without regard to its nature and the enjoyment of any right over real property, no matter what its nature, as well as the status of the person in whom that right is vested, should be considered as contrary to the rational principles of private international law, which fixes the limits of the legislative power of every government.

197. The respective right of the territorial and foreign sovereignty to regulate through its own laws the rights to personal and real property; the acquisition of the ownership of such property; its transfer by deed or will; the extrinsic forms of the instruments to be used in such a case; and the exercise of any right relating to property, must be fixed and determined by agreement between states, which should lay down uniform rules as regards the legislative power of every government and should determine the just limitations upon that power.

In the absence of such an agreement, the power to assign territorial or extraterritorial authority to every law cannot be considered as within the competence of national autonomy, but should be governed by the rational principles of private international law.

These proposed rules aim to establish the rule that, in principle, the sovereignty of the state cannot by reason of its eminent domain over the whole territory, subject to its own laws every relation of private law concerning real property, nor the right to transfer it by inheritance or otherwise. It should be admitted that the legislative power of every sovereignty in its relations with the legislative power of other states must be determined through rules established by treaties, or according to the rational principles of law. Then it is for private international law to lay down the rules designed to determine the true rational limits of the authority of every law, so as to eliminate all causes of conflicts between the laws of the different states. In order to attain that end, we must refer to the special rules which govern this matter. (See on this subject, my work, *Sull'autorità e sull'applicazione delle leggi straniere o Diritto internazionale privato*, v. 4. Turin, Unione Tip. Editrice, 1902, and the French translation by C. Antoine, Paris, A. Pedone.)

Compare, Demangeat, *Introduction to Clunet, Journal du droit international privé*, v. I.

#### AUTONOMY IN ITS RELATIONS WITH FOREIGNERS

198. It is always incumbent upon every state to regulate the legal status of foreigners and all their rights, so as to reconcile its



own autonomy with its respect for the common interests and the rational principles of law.

199. It is a violation of the rational principles of law for any state to refuse to foreigners, by virtue of its autonomy, the enjoyment of their private or civil rights, or to sanction legal reprisals, or to establish an essential difference of legal status between citizens and foreigners as to the acquisition of private rights, except to reserve to its citizens alone for reasons of public policy the acquisition and enjoyment of certain defined rights.

The private rights of every man, called civil rights, are in reality but the natural rights recognized by civil law, which proclaims them, regulates their exercise and insures their enjoyment.

A difference of legal status between the citizen and the foreigner as regards the respect of the private rights of the latter according to his personal statute cannot, therefore, in principle, be justified. Nor can one any more justify the subordination of the enjoyment of these rights to the condition of reciprocity; for legal reprisals must be considered contrary to the principles of international law and a violation of the rights of man, the respect of which may be claimed by any one in international society according to the principles laid down in rules 67 and 68. [The grievous effects of the war on juristic thought may be seen in an article by the brilliant French jurist, Pillet, of the University of Paris, who openly advocates discrimination against certain foreigners after the war. *Yale Law Journal* for June, 1917, v. 26, pp. 631-644.—Transl.]

200. It is not permissible, by virtue of legislative autonomy, to refuse to foreigners the application of the laws in force in the state protecting the person and the private rights of every one, or to establish a substantial diversity of treatment in that respect by reason of the mere circumstance of alienage.

The legislatures of civilized countries have a tendency at the present time to remove the difference existing between citizens and foreigners with respect to the enjoyment of civil rights. A good example is furnished by Italy, which embodied the principle in article 3 of the Civil Code and has assimilated the foreigner to the citizen with respect to the enjoyment of civil rights. (Compare Laurent, *Droit civ. intern.*, v. II, § 38, p. 65.) [The Chilean Civil Code, drafted by Andres Bello, anticipated Italy by ten years in this provision.—Trans.] The right of the state to reserve the enjoyment of certain rights to citizens, for reasons of public policy, is one that cannot be denied. It may be considered as within the domain of legislative autonomy. But no system of law can be established by virtue of autonomy, by which foreigners would be placed outside common law as regards the acquirement and enjoyment of civil rights, or which would justify all the excessive measures, called *droit d'aubaine*, which used to oppress foreigners under the old law. Nor can the security *judicatum solvi* or *pro expensis* imposed on the foreigner who prosecutes his rights in the courts be justified. This security is not only not required in Italy, but, fur-

thermore, the legislature (art. 8 of the law of December 6, 1865) has extended to foreigners the benefit of the laws of December 6, 1865, and of July 19, 1880, under which in certain cases the free services of a lawyer and the advance cost of law suits may be obtained.

See my works: *Diritto internazionale privato*, 5th ed., v. I, *Preliminari*, cap. III, Parte speciale, lib. I, cap. I, Torino, 1914; *Dell'autorità della legge nei suoi rapporti col territorio*, v. I, sec. II of the work: *Delle disposizioni generali sulla pubblicazione ed applicazione delle leggi*, 2d ed., Napoli, Eugenio Marchieri, Torino, Unione Tip.-Ed. Torinese, 1914; *Della cittadinanza*, cap. VIII, pp. 167 *et seq.*, Napoli, E. Marchieri, Torino, Unione Tip.-Ed. Torinese, 1909.

#### EXERCISE OF THE LEGISLATIVE POWER AND ITS JUST LIMITATIONS

201. Every state has the exclusive power to determine the appropriateness of its laws, the necessity of modifying them and their efficacy to protect the rights of private persons and to secure the respect of international law.

202. Any interference by a foreign power to compel a state to modify its laws under the pretense of better protecting the rights of its citizens, should be considered as a violation of the legislative autonomy inherent in every state.

203. It is always incumbent upon the legislature of every country to see that its own legislation sufficiently protects the rights of private persons in their relations among themselves and with the state and secures the respect of international law.

204. It is not permissible for a foreign state to criticize the legislative system of another state, or to request that it be modified under the pretext of not being adequate properly to protect the rights of persons. Only the right to make representations in the matter may be deemed proper, leaving it to the discretion of the other government to take notice of the request submitted.

205. Nevertheless, when the legislative system in force in a state is considered by a Congress as inadequate to protect the rights of foreigners or to secure the respect of international law and as requiring certain reforms, the state cannot refuse to heed such collective representations. It must modify its existing laws by remedying their deficiencies, under penalty of placing itself without the law which ought to govern international society.

There are quite a number of cases of collective representation made by the Great Powers assembled in a Congress to demand the amelioration of the

legislation of certain states considered insufficient for the protection of the rights of persons, or to impose the execution of a promise of certain legislative reforms.

The Congress of Paris of 1856 imposed on Turkey the revision of the statutes in force in the principalities of Valachia and Moldavia, and charged an international commission to assume control of the bases of the new organization of these principalities and to make proposals on the subject (art. 23).

In the treaty of Berlin of 1878, the Great Powers assembled in Congress recognized the independence of Montenegro, Servia and Rumania, under the condition, however, that the public law in force in these states be based on certain rules fixed by the Great Powers (arts. XXVII, XXXVI, XLIV).

Under this same treaty, there was imposed upon Turkey the obligation to carry out the improvements and legislative reforms required to protect the rights of the Armenians and to insure their security against the Circassians (art. LX).

In the treaty concluded at Constantinople September 6-18, 1897, between the Great Powers and the Ottoman Empire to fix the conditions of peace with Greece, it was stipulated (art. 3) that the two contracting parties would see to the removal of all obstacles likely to hinder the regular course of justice; to insure the execution of the judgments rendered by their respective courts; and to protect the interests of the Ottoman and foreign citizens in their disputes with Greek citizens, even in case of bankruptcy.

## AUTONOMY OF JUDICIAL POWER

### RULES RELATING TO JURISDICTION AND COMPETENCE

206. Every government must be considered autonomous from the point of view of the exercise of its judicial power; and it may fix the territorial jurisdiction and determine the competence of its own judges with reference to any litigation relating to persons, property, obligations or any other matters.

207. Nevertheless, no government may, by virtue of its autonomy, attribute jurisdiction to its courts whenever the *potestas judicandi causam* belongs to a foreign government.

When it assumes a jurisdiction which it does not properly possess according to the principles of law, such act must be considered as an arbitrary usurpation of jurisdiction and as a violation of international law.

208. The rules relating to the right of jurisdiction possessed by this or that government, and whose purpose is to determine to which of these governments the *potestas judicandi causam* ought properly to be attributed constitute the rules of jurisdiction according to international law. They must be fixed by agreement, or

in the absence of treaty, deduced from the general principles of law, as is the case whenever no positive rule exists.

It is desirable to distinguish clearly between jurisdiction and competence considered as powers of the magistrate, which may be assigned to the judge by the territorial sovereign, and jurisdiction considered as a right belonging to every government concurrently with other governments and which constitutes, properly speaking, the *potestas judicandi causam* as a power of the state.

The sovereign of every state may determine with absolute autonomy which of the jurisdictions of his own country must be given the right to pass upon any particular case, and which of the judges in a certain jurisdiction must be held competent to decide the case, considering its nature, importance and locality. All these are matters of public law in each country and fall under the application of rule 206.

The case is quite different when the question involves jurisdiction considered as a power of the state. When the question arises of establishing whether the *potestas judicandi causam* belongs to Italy, France or Germany, it is no longer a question of public law which is involved, to be determined with entire liberty by each state by virtue of its autonomy, but it is a true question of international law, for whose solution no sovereign can impose rules binding upon the other states. Such a question could be solved only by reciprocal agreement. In the absence of such an agreement the only course to be followed is to apply the general principles of law. Consequently, if the state, by reason of its autonomy, should give jurisdiction to its judges in a case where the *potestas judicandi causam* belongs to a foreign state, the act must be considered as arbitrary and contrary to international law; for it would constitute an unjustifiable usurpation of the jurisdiction belonging to a foreign state.

In the terms of article 14 of the French civil code there is found an example of jurisdiction assigned arbitrarily to the courts of the state in contradiction to international law. As for us, we have always maintained that the autonomy of a state in violation of the rules of jurisdiction according to international law can never be admitted. See Fiore, *Effetti internazionali delle sentenze* (Materia civile), cap. III, § 3, Torino, 1875; *id.*, Note on the decision of the court of Catania of March 22, 1879, in *Foro italiano*, 1879, p. 714; *id.*, *Diritto internaz. pubblico*, 4th edition, Torino, 1904, §§ 402, 405; *id.*, *Sulle disposizioni generali delle leggi*, 2d edition, Napoli, Marghieri, 1908, Torino, Unione Tipografico-Editrice Torinese, v. I, §§ 454-458; *id.*, *Questioni di diritto, Della giurisdizione e della competenza nei loro rapporti col Diritto internazionale*, pp. 533-40. Torino, Unione Tip.-Editrice Torinese, 1905.

The principles which we have set forth were admitted for the first time in the Court of Florence in its decision of December 2, 1882, in the case of *Blanc v. Trafford*. The Court says: "The question to be decided as to which of two courts of a foreign state is competent, must be settled in accordance with the law of the country where the action was brought; but when, on the contrary, the courts whose jurisdiction is brought in question do not belong to the same state, the question is settled in conformity with the principles of international law. (See *Foro italiano*, 1882, I, p. 1148.)

#### EXTRATERRITORIAL EFFECT OF A CIVIL JUDGMENT

209. Every government may, with the fullest autonomy, fix the legal conditions required to give to a foreign judgment the

authority of a final judgment. It may also limit, for reasons of public policy, the effects produced by such judgment.

210. No foreign judgment can, in principle, be considered sufficiently effective to permit it to be forcibly executed. Executory force must be given to it by the competent judicial authority in conformity with the territorial law, which must determine whether, how and when the foreign judgment may be executed and what rules of procedure must be followed.

The two preceding rules are based on the distinction between the two substantial elements of any judicial decision. The judge called upon to decide the case must in the first place examine the rights of the parties and declare their reciprocal rights in law. This declaration of the right in dispute amounts to a legal truth and it cannot be denied, in principle, that it ought to be given extraterritorial effect. Nevertheless, the sovereign of every country may determine the legal requirements according to which the authority of a final foreign judgment must be admitted. It is undoubtedly necessary that the decision of the judge should conform with the required conditions in order that it may be considered a judgment. Now, the determination of those characteristic conditions, in the absence of uniform rules laid down by agreement in a treaty, must be considered as within the domain of the autonomy of every state. Therefore, it is in accordance with the law of each state that we must decide the conditions which the judgment emanating from a foreign court must meet in order to have the authority of a final judgment.

The judge, however, does not limit himself to declaring the right of a party, but orders the other party also to recognize the declared right and allows the party whose right is recognized to resort to coercive measures to compel his adversary to execute the decision. This is what gives executory force to the judgment. Now, it is natural that, by reason of the autonomy of every state, the coercive measures should be exclusively prescribed by the state on whose territory the forcible execution of the judgment takes place.

211. Except for the right possessed by every state under the two foregoing rules, it should be considered contrary to the principles of international law to refuse all effect to the judgment pronounced by a foreign court, and to compel the contending parties to litigate again the merits of the controversy.

212. It is the duty of civilized states to determine by treaty what indispensable conditions must be met in order that a foreign judgment may have the extraterritorial authority of a final judgment and be executory. Such conditions ought to restrict the powers of the state court—called upon under territorial law to order the execution—merely to an examination as to whether the judgment fulfills the legal conditions necessary to give it extraterritorial effect, without the power of compelling the parties to

discuss anew the subject-matter of their contested rights. After this is done, the authority of the territorial law could be admitted in the matter of execution. In that respect it is advisable to adhere to the authority of the law in force in the place where it is desired to proceed with the execution.

The reciprocal advantage to states of regulating by treaty the execution of foreign judgments is generally recognized; but an agreement has not yet been reached in that respect, notwithstanding various attempts.

A conference was contemplated which was to meet in Rome on the initiative of Mancini, but it did not take place. There is no doubt that in order to establish a uniform law on the subject, a treaty is indispensable. This treaty ought to determine the rules of international jurisdiction (leaving to the autonomy of each state those of territorial jurisdiction and competence), and ought also to establish the rules regarding service of process on absent foreigners and judicial commissions rogatory, as well as the rules which, in general, relate to the conditions required for the extraterritorial validity of judgments. Thus, judgments pronounced by the respective courts of the states which may be parties to the treaty could have the legal force of final judgments in the territories of the contracting powers. As to making executory in a state final judgments rendered in a foreign country, it must be noted that such judgments might be executed whenever they are held final and executory in the country where rendered, and it would be necessary to adhere to the law in force in the country where they are to be executed. It should make no difference whether the judgment was pronounced by the competent court against a foreigner, a citizen of the state where it is to be executed, nor should execution be denied on that ground. Instead, the fact should be ascertained whether the judgment was pronounced in conformity with the rules established in the treaty, and the execution of the judgment pronounced against the citizen of the state in which it is desired to proceed to execution ought not, in principle, to be refused.

#### CONDITIONS REQUIRED OF A FOREIGN JUDGMENT UNDER INTERNATIONAL LAW

**213.** The conditions required of every judgment, under the rational principles of international law, in order to give it extraterritorial authority and be declared executory are:

- a. That it bear the character of a final judgment under the law of the country where the action was brought and that it be executable in accordance with that law.
- b. That it shall have been pronounced by a court competent under the same law with the condition, however, that such competence is not assigned to the court in violation of rule 207;
- c. That the party against whom it is desired to execute the judg-

ment has been duly served with a summons, or has been legally in default, taking into account the rules prescribed for the summoning of absent foreigners under the law of the place where the suit was instituted;

- d. That it does not wholly lack good cause;
- e. That the judgment be not in any way derogatory to the public law of the state where it is desired to execute it, nor to the territorial laws concerning persons or property, nor to public policy;
- f. That it be not pronounced in violation of the rules of private international law provided for in any treaty in force between the state where the judgment was rendered and the state where it is to be executed;
- g. That, when the judgment has been pronounced against a citizen of the state where its execution is desired and the judge has had to apply the law of that state, no erroneous application of that law has been made.

The object of this rule is to enumerate the conditions which might be considered as essential, according to rational international law, for the execution of a foreign judgment. These conditions, we believe, might constitute the common law of states which might wish to conclude a treaty in the matter. In such a case, the execution and mode of procedure for declaring the judgment executable must be regulated by the law of the place where it is to be executed. So long as such a treaty has not been concluded, it is natural that not only the execution of foreign judgments, but also their executory force, must be governed in every state by the territorial law. Accordingly, the execution of such judgments must at the present time depend upon the municipal law of every country and it may be observed that in that status of the law, no state may claim that its own rules shall have any extraterritorial authority under the principles of reciprocity, unless formally so stipulated between the country where the judgment was pronounced and the country where execution is desired.

Italy has regulated this matter in articles 941 and following of the Code of Civil Procedure. The *exequatur* is issued upon a proceeding called *delibazione*, but it cannot be claimed that the rules sanctioned by Italy have any authority to regulate the execution in foreign countries of judgments of Italian courts.

**214.** When the party against whom it is desired to execute the foreign judgment insists that it could not be executed under the *lex fori*, it is incumbent on the party requesting execution to prove that it is executable in the country where rendered.

**215.** Even when the judgment may be executed under the law of the country where rendered, the *exequatur* may be refused:

- a. When the legal effects of the judgment, or the legal fact

which it is desired to establish are contrary to the local public law or public policy.

- b. When the means or measure of execution ordered by the foreign judge is forbidden by the territorial law.

**216.** It is the right of every state to regulate by its own laws the methods and forms of execution and all matters relating to the proceedings for execution.

**217.** When a foreign judgment is introduced in evidence for the mere purpose of proving a legal fact or of establishing the status of persons, without any desire that execution issue upon it, such judgment has of itself the probative force of any duly authenticated act, and shall fully prove its contents. It is the right, however, of every state to determine the value which shall be assigned to the foreign judgment produced, and it must always be left to the discretion of the competent judge to decide whether the said judgment may or may not have probative force as against the party against whom it is invoked.

It may be remarked that the judgment in so far as it is final implies, according to Italian law, a legal presumption of truth. The party in whose favor it was rendered and who produced it to establish his right, is consequently exempted from producing any other proof.

Nevertheless, if such presumption of truth is assigned, according to the laws of civilized countries, to the judgments of the courts of the state under the principle *res judicata pro veritate habetur*, that principle cannot apply to the judgments rendered by foreign courts. As regards them, we must posit other principles. It cannot be maintained, in fact, that the presumption of truth assigned by the legislator to final judgments rendered by the courts of the state must be extended to those proceeding from foreign courts. The legislator may undoubtedly determine under what conditions the presumption of truth may be assigned to such decisions; but when the statute is silent, it must be admitted that it is within the power of the judge to decide the question by applying the general principles of law.

Certainly, it cannot be sufficient, by producing a document in authentic form with the claim that it is a judgment, to draw the conclusion that it must have the authority of a final judgment against the party against whom it is invoked. It is necessary for the judge to make sure that the document produced is a true judgment and in order to assign to it that character, it is necessary to establish that it fulfills all the requirements of the territorial law in that respect.

The Italian legislator, as we have already said, has established in the Code of Civil Procedure, certain rules for the execution of foreign judgments. But, when execution is not in question and the foreign judgment is produced merely for the purpose of establishing the legal fact which the judgment sets forth, it may be doubtful whether the conditions necessary for execution can be regarded as complied with or whether it can be deemed sufficient to assign to



the judgment which is produced in authentic form, the legal presumption of truth. Indeed, it does not seem so; but this is not the place to discuss the question.

Compare: Fiore, *Disposizioni generali sull'applicazione e interpretazione delle leggi*, v. II, 2d ed., 1914, §§ 977, 982, Napoli, Marghieri, Torino; Unione Tip.-Ed. Torinese; *id.*, *Memoria letta all'Accademia delle scienze morali* of Naples, *Atti dell'Accademia*, Resoconti, 1903.

#### AUTONOMY OF THE STATE IN CRIMINAL MATTERS

**218.** Every state has the autonomous right to designate by appropriate laws the acts which shall be deemed offenses and to provide for their repression and punishment by means of penalties pronounced against their authors and accomplices, subjecting indiscriminately to penal and police laws and to the application of the appropriate penalties all individuals within the state, whether citizens or foreigners.

**219.** No state can object to the system of penal legislation in force in another country, on the pretext that the penalties applicable to its own citizens guilty of an offense are unjust, oppressive and not in accord with the laws of a civilized state. It can only object if its citizens are not subjected to the same formalities of procedure and furnished the same legal guaranties as are extended to the citizens of the state.

**220.** In like manner, every state has the exclusive right to regulate criminal prosecutions and to object absolutely to the performance by a foreign government of any act, whatever its nature, implying the exercise of penal jurisdiction on the part of that state.

#### EXECUTION OF FOREIGN PENAL JUDGMENT

**221.** No state can, without forfeiting its autonomy, recognize in its territory the authority, as a final judgment, of a foreign penal decision, or insure its execution there.

**222.** The state can only admit by an *express* law that, under certain fixed legal conditions and in specific cases, certain legal effects (such as the prohibition of the holding of public office and other incapacities) arising from a penal sentence may result from the penal judgment of a foreign court.

The state may, besides, hold that the foreign criminal judgment

is an effective title for demanding the extradition of the accused or convicted person, reserving to itself the right to grant it.

Our rules tend to establish the principle of the territoriality of penal law and of the criminal action and to exclude the execution of a penal sentence in a foreign country. There are, however, certain cases where the state may assign an extraterritorial authority to the penal law which it has enacted; but such cases constitute an exception to common law. See below, the rules relating to penal jurisdiction.

The criminal action is, however, always exclusively territorial, like the executory force of the penal judgment. Criminal conviction implies, in fact, a restriction upon the free exercise of personal rights and liberty, and it cannot be admitted that it may produce such effects outside of the territory of the state in whose name the proceedings were instituted. The sovereign may decide, however, that in certain cases the penal sentence pronounced in a foreign country against a citizen can bring about certain effects resulting from the status of the convicted.

The Italian legislator has provided as follows in these matters in article 7 of the Criminal Code of 1890: "If, against a citizen, for an offense committed on foreign territory, which is not one of the territories where extradition is not recognized, a sentence has been pronounced which, under the Italian law, might involve as a penalty or penal effect the interdiction of public office or other incapacity, the judicial authority, on recommendation of the public prosecutor, may declare that the sentence pronounced in a foreign country shall produce in Italy the said interdiction or incapacity; subject to the right of the convicted person to ask that before deciding on the recommendation of the public prosecutor, the proceedings pursued abroad be reviewed." See also article 9 of the Criminal Code of Baden and article 37 of the German Criminal Code.

## AUTONOMY OF THE EXECUTIVE POWER

**223.** The sovereign of the state has the exclusive right to provide, with the most complete autonomy, for the execution of the laws of the state and for matters relating to public administration; and he is bound to account for his conduct only to the authorities established according to constitutional provisions.

**224.** Interference of a foreign state in the acts of public administration cannot be justified under pretense of protecting the interests of citizens. Protection in that connection must be considered in the first place as unlawful whenever its purpose is to obtain for citizens residing in the foreign state a privileged position.

**225.** Nevertheless, a government believing itself injured by the actions of a foreign government or considering that the interests of its own citizens are injuriously affected by such actions, may protest and make reclamation through the diplomatic channel.

It may, moreover, in appropriate cases, undertake judicial action before the courts of the foreign country in conformity with the laws there in force, for the defense of its property rights violated either by the administrative acts or abuses of authority of the foreign government.

The foregoing rules are based on the idea of the autonomy of the state in the exercise of its powers and functions within the state. Nevertheless, as it is incumbent on every government to exercise its powers without injuring the interests of foreign governments and citizens, if the administration should be completely disorganized (as is the case in Turkey, for instance) foreign governments cannot be denied protection, through diplomacy, of their own interests and those of their citizens, by making before the disorganized government the necessary representations to obtain the reorganization of its administration. This is especially necessary where it concerns the financial administration, whose abuses and corruption may gravely compromise the pecuniary interests of foreign governments and persons.

In the case of a genuine injury to property rights, judicial action could be exercised in the cases and according to the principles set forth below.

**226.** No sovereign can assign jurisdiction to the courts of his state in proceedings instituted by citizens against foreign governments for damages caused by acts of administration of a foreign government. Such claims could only be advanced through administrative channels and give rise to diplomatic action, in appropriate cases.

This rule is based on the generally recognized principle of international law that the jurisdiction with respect to administrative acts belongs to the state in whose name the acts were performed and that to submit administrative acts of a government to the jurisdiction of a foreign state would be like subjecting one sovereign to another.

See, to this effect, the judgment of the civil court of the Department of the Seine of May 2, 1828, in the case of Ternaux Gandolphe against the Republic of Haiti:

"In view of the fact," said the Court, "that it is an established principle of international law that states are independent of each other; that the most immediate consequence of this fact is the right of jurisdiction which each state retains over its own acts; that to subject the engagements or contracts of one state to the jurisdiction of another would necessarily deprive the former of independence and render it subject to the other, whose decision it would be compelled to obey. . . ."

The French Court of Cassation has sanctioned the same principle in the case of Lambèze and Poujol against the Spanish government. Its judgment reads:

"In view of the fact that the reciprocal independence of states is one of the most universally recognized principles of the law of nations; that consequently a government cannot be subjected with respect to its contracts to the jurisdiction of a foreign state; that, indeed, the right of jurisdiction possessed by every government to pass upon differences or cases which arise out of its

governmental acts is a right inherent in its sovereign authority, which a foreign government cannot usurp without exposing itself to the danger of altering their mutual relations. . . ."

See Fiore, *Diritto internazionale pubblico*, 4th ed., 1904, v. I, §§ 418-419, and the article under *Agenti diplomatici*, in the *Digesto italiano*, nos. 211-217; Dalloz, *Jurispr. générale*, 1849, I, 5.

**227.** The autonomy of the administrative power of every state must be reconciled with the exigencies arising out of the common existence of states in international society.

#### LIMITATION OF AUTONOMY

**228.** The autonomy of each state cannot be considered as absolute. It is limited by the obligations imposed on all members of the *Magna civitas* to respect, in the exercise of all their rights, the superior principles protecting the necessities of international life, and not to violate the rules established to insure the respect of the common interests of states.

This autonomy may, moreover, be limited by virtue of conventions concluded with one or several other powers.

**229.** Every convention which limits the autonomy possessed by each state according to common law, must be considered an exception to the general rule. It cannot extend beyond the case expressly stipulated nor be applied beyond the time fixed; it must always be construed as is every exceptional law which restrains the free exercise of rights, that is to say, in the sense most favorable to the state which must suffer the restraint and least restrictive of its natural liberty.

**230.** No limitations of autonomy can be based on presumptions or inference or on usage observed even for a considerable length of time.

**231.** Forced limitation of the autonomy of a state should be considered as opposed to modern international law when its importance is so great as to deprive the state of its full international legal capacity, by placing it, with respect to another state, in the situation of a vassal.

Such a limitation imposed by force can be considered valid only if recognized and ratified by a Congress.

Modern international law must aim at doing away with the anomaly of semi-sovereign states, because history shows that any relation of subordination and vassalage between two states is a permanent cause of international

difficulties and social disturbances. Dualism in the exercise of sovereign powers is incompatible with the idea of sovereignty, because sovereignty must be one and indivisible. In the old international society, there was a perpetual struggle between the vassal states, who wished constantly to recover their absolute independence, and the suzerain states who wished to maintain their high suzerainty at any cost. A striking example of such a struggle is furnished by the sanguinary wars waged by the Danube principalities against Turkey.

**232.** The limitation of autonomy may be extinguished by written agreement, by express or implied renunciation by the state in whose favor such limitation had been adopted or by all the modes of denouncing or terminating international conventions.

**233.** The limitation is also considered annulled when circumstances have so changed that if they had existed thus modified at the time the limitations were established, the limitations would have had no reason to exist.

This rule would apply in case of the proclamation of new principles of common international law under which the restriction of autonomy previously established would be incompatible.

The same conclusion would be reached in cases where, on account of certain events, relations between states are substantially modified. Thus, many servitudes of international law born in the middle ages by reason of the feudal organization of certain principalities were extinguished in consequence of the organization of modern states.

A restriction upon the free exercise of the rights and autonomy of the state is that arising from the system of extraterritoriality. Nevertheless, as this system constitutes an exception to the general rules and finds its justification in the special historical circumstances existing in the state subject thereto, it follows that when, owing to the progress of civilization, the conditions are so modified as to destroy the historical conditions which justified such an exceptional situation, it should be considered as naturally abolished.

**234.** Any kind of conventional limitation of the autonomy of the state which gives rise to a restriction of the free exercise of sovereign rights, may be considered as a form of international servitude.

It may consist in the obligation not to do something that one should have the right to do, or in the obligation to suffer and tolerate another state's doing something which, under common law, it would not be authorized to do.

We say, a form of international servitude, because servitude, properly speaking, always implies a territorial right, as for instance the obligation of passage or the obligation to build a road for commerce.

See the rules relating to international servitudes, set forth below.

**235.** The first category consists of:

- a. The conventional obligation imposed on certain states to observe perpetual neutrality;
- b. The obligation to destroy certain fortresses and not to allow their reconstruction;
- c. The obligation not to possess war vessels above a certain number and not to allow them to enter certain waters of the state;
- d. The obligation of having no arsenals or custom offices or garrisons in certain parts of the territory of a state, and all other analogous restrictions.

The obligation of permanent neutrality imposed on certain states is to be considered as a limitation of their autonomy. Such is the case of the Swiss Confederation by virtue of the treaty of Vienna of March 20, 1815; of Belgium under the treaty of London of November 15, 1831; of Luxemburg, under the treaty of London of May 11, 1867; of Congo, under the declaration made by that state on August 1, 1885, in conformity with article 10 of the treaty of Berlin of 1885.

The obligation to destroy certain fortresses and not to be allowed to rebuild them has been stipulated in various treaties, old and recent.

Thus, the obligation to demolish the fortifications of Dunkirk and not to rebuild them was imposed on France by article 9 of the treaty of Utrecht of March 13 and April 11, 1713. In the treaty of Berlin of July 13, 1878, there was imposed on Bulgaria the obligation not to erect any fortress within a radius of ten kilometers around Samakov (art. 2). In like manner, under the same treaty, Montenegro was forbidden to have any ships or flag of war and the obligation was imposed on her to demolish the existing fortresses and not to build any on her territory between the lake of Scutari and the coast (art. 29). Compare: Bonfilis, *Droit international public*, §§ 338 *et seq.*

**236.** The second category consists of:

- a. The obligation to allow a state to exercise the right of police and to maintain a garrison;
- b. The obligation to allow one or more states to exercise financial control or to collect taxes;
- c. The obligation to allow one or more foreign states to interfere in the operation of certain public services, and to provide for the administration of justice.

Instances of this sort of servitude in international law are not lacking. Thus, under the treaty of Berlin of July 13, 1878, the obligation was imposed on Montenegro of allowing Austria to exercise maritime and sanitary jurisdiction at Antivari and on the Montenegrin coast.

In 1876 the obligation was imposed upon Egypt of allowing financial control by the states interested in preventing the bankruptcy of that country, which

might have resulted from the financial maladministration of the Khedive. After the war of 1897 with Turkey, the Great Powers imposed their financial control on Greece so as to protect the interests of their citizens. Cf. Bonfila, *op. cit.*, § 189.

The institution of mixed courts in Egypt is an example of limitation of the autonomy of the judicial power, constituting a sort of servitude of international law.

**237.** Every kind of limitation of autonomy may be extinguished either by express agreement or by virtue of the termination of the convention which established it.

France was liberated from the obligation not to rebuild the fortification of Dunkirk which had been imposed on it under the treaty of Utrecht of 1713, by causing the repeal of that stipulation in article 17 of the treaty of Paris of September 3, 1783.

Russia which, under articles 13 and 14 of the treaty of Paris of 1856, had been compelled to demolish the fortifications it had built on the coast of the Black Sea, was liberated from this servitude by declaring during the Franco-German war of 1870-1871, that she did not intend any longer to be bound by the treaty of Paris in so far as it restricted her rights on the Black Sea. In consequence of this declaration, the Great Powers met in London, and under the treaty concluded there March 13, 1871, Russia was relieved from the obligation which had been imposed on her by the treaty of 1856.

## TITLE IX

### RIGHT OF INDEPENDENCE

#### GENERAL RULES

**238.** The independence of every state consists in the right to prevent any sort of interference on the part of a foreign state and to forbid on its territory the exercise, in the name of a foreign state, of any act which implies the exercise of sovereign power.

Independence is *self-government*, that is to say, the most complete autonomy as regards every act of government.

**239.** If a state, by virtue of its independence, were to adopt a system of isolation, forbidding international commerce, prohibiting the peaceful use of avenues of communication and of public institutions, closing all its ports to merchants and preventing civilized states from procuring on its territory objects of prime necessity indispensable for the satisfaction of their intellectual or moral needs, it would violate the principles of international law and would justify the collective intervention of the other states in order to remedy such abnormal conditions, so contrary to the general interests of international society.

This rule may serve to explain how China was compelled to open a certain number of her commercial ports, owing to the necessity of European states to import opium and to trade. The absolute isolation in which China wished to live brought about the war which England declared against her in order to compel her to abandon her erroneous ideas of superiority and to conclude the treaty of peace of Nankin of 1842, which resulted in the establishment of the first commercial relations of Europe with China by the opening up to trade of the ports of Canton, Amoy, Foochow, Ning-Po and Shanghai.

Two years later, by the treaty of Wampo of October 24, 1844, France was recognized by China as having the right to trade and to establish consulates.

#### PROPER LIMITATIONS OF INDEPENDENCE

**240.** No state can claim absolute independence, but only such independence as is compatible with that of others, with the exigen-



cies of international society and with the conditions indispensable to the maintenance of the legal organization of that society.

**241.** No state can, by virtue of its independence, claim the right to reject the collective intervention of states which agree unanimously that the exercise of its sovereign powers constitutes a palpable violation of international law, an offense against the rights of humanity and an evident violation of common law.

Domestic revolutions must be considered in principle as questions of public internal law. Nevertheless, it cannot properly be claimed that no matter what the conditions within a state, it is a matter of no import to the other countries of the international society, and that any interference by them may be rejected by virtue of the right to independence possessed by every state.

When, in the course of civil war, massacres, spoliations, torture and other atrocities occur, provided these acts as a whole are in the nature of an evident violation of international law and the sovereign of the state has neither the power nor the means to prevent offenses against the rights of humanity, the intervention of the great powers, which agree upon the necessity of ending such abnormal conditions and of restoring the authority of common law, cannot be contested on a claim of the right of independence.

To be sure, if only one or two states wish to intervene, their action might be considered as an attack on independence, but the same argument cannot hold when the great powers agree upon the necessity of intervening. Their action would then be in the nature of a collective legal protection.

The slaughter of the Christians by Mussulmen, encouraged by the indifference if not the complicity of the Turkish authorities, which took place in Syria in 1860 and those perpetrated in Bulgaria in 1876, constitute cases calling clearly for the application of our rule.

**242.** Collective intervention should be admitted:

- a. In case of violation of the rules of international law by the government of a state;
- b. When the public authorities, in the exercise of their functions, have manifestly violated a municipal law by applying it with palpable injustice to the prejudice of foreigners, and the government, notwithstanding the just protests of the states of which these foreigners are citizens, has not granted them any satisfaction as a reparation for the arbitrary acts committed to their detriment;
- c. When municipal laws do not afford sufficient protection to the rights of foreigners or when legal guaranties are not deemed sufficient in matters of procedure effectively to prevent any abuses of power on the part of public authorities.

**243.** When, in spite of a collective protest, the government to

which it was made continues arbitrarily to maintain the conditions considered by other states as contrary to the principles of international law and to those regarded by the protesting governments as essential for the effective protection of the rights of foreigners, the difference thus arising may properly be referred, as the case may be, either to an arbitral court or to a Conference.

244. When the arbitral court or the Conference recognizes the justice of the claim, it is incumbent on the state summoned before it to conform to the award or finding. In case of a persistent refusal voluntarily to execute such award, the government which filed the protest may, after it has exhausted diplomatic action, and should the case warrant it, resort to compulsion to secure execution by means admissible under international law.

Suppose, for instance, that during a civil war, justice should be administered with partiality, as happened in 1907 in Guatemala where, as the result of an attempt to assassinate President Cabrera, a court-martial rendering summary justice pronounced the death sentence upon 19 persons who were declared guilty of that crime, in the absence of all regular proceedings. One could not in our opinion, under such circumstances justify matters by invoking the principle of the autonomy of the judicial power of every state.

Autonomy could not, in fact, be invoked to the extent of violating, to the prejudice of foreigners, the principles of common law which protect the rights of humanity; nor could objection be made to collective interference and action to insure respect for the authority of law.

245. The principle of collective intervention, considered as a legal method of limitation upon the absolute independence of a state, must be applied without discrimination whether the facts occurred in Europe or America.

The purpose of this rule is to determine the correct conception of the law which ought to govern international society. Since this society is constituted by all the states which have relations with one another, they must all without distinction be subject to the fundamental laws designed to maintain the legal organization of such society. It cannot be admitted that international law may have a varying authority, depending upon whether it is to be applied to the states of Europe or America. Contrary to this correct idea is the hardly reasonable one proclaimed by the United States under the name of the Monroe doctrine, according to which American states alone have the right to settle with complete independence any question which might concern them. President Monroe, in his message at the convening of Congress on Dec. 3, 1823, expressed himself as follows:

"But, with the governments who have declared their independence, and maintained it, and whose independence we have, on great consideration, and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling, in any other manner, their destiny,

by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States." The President really meant to oppose any intervention of the European powers which contemplated an attack upon the independence of the colonies which had lately declared their independence. In that respect he expressed a proper view in affirming that the political independence of those new states could not admit of any limitation.

Monroe's doctrine was subsequently exaggerated by those who, making no proper distinction between matters of general interest which doubtless cannot be solved independently of each of the interested states, and those of private interest, have sought to find in the message the affirmation of the absolute independence of the American states in all matters in which they might be concerned, whatever their substance or purpose. This is absolutely inadmissible.

Finally, it has been sought to invoke the Monroe doctrine by objecting to any action of European powers, when, in order to protect the interests of their subjects, they have rightly reminded certain American states that they must respect their obligations toward these individuals.

The Monroe doctrine, thus understood, results in allowing an American state to disregard the principles of justice in its relations with foreigners, to violate moral laws, to refuse to entertain the just claims of foreigners injured by its acts, to create, thus, an abnormal and illicit state of affairs under the principles of common law and international morals, and to object to any form whatsoever of interference designed to put an end to such manifest violations of the principles of justice, by advancing in opposition the principle of its independence and the Monroe doctrine. Surely, this is not admissible.

Can it be maintained that the American states may so take advantage of their independence as to scorn openly the legal order and the laws of the international society?

## TITLE X

### RIGHT OF IMPERIUM

#### GENERAL RULES

**246.** The right of imperium or sovereignty consists of the eminent domain which resides in the sovereign of every state over all its territory and over analogous places.

Under this right, the sovereign possesses the supreme power to subject all individuals, either citizens or foreigners, residing in the territory or places within his domain, to the laws he has enacted to protect the rights of individuals, of groups and corporations and of the State and to assure the respect of international law.

**247.** No act of authority, command or coercion can be enforced outside the territory and places where the sovereign exercises eminent domain.

Roman jurists considered the right of imperium as so exclusively territorial that they defined territory as the whole of the lands over which command and coercive power could be exercised. *Territorium*, said Pomponius, *est universitas agrorum intra fines cujusque civitatis, quod ab eo dictum quidam aiunt quod magistratus ejus loci intra eos fines terrendi, id est summovendi jus habet* (L. 239, § 8, Dig., *De verborum significatione*).

On the bases of this same idea, the jurist Paul said: *Extra territorium jus dicendi impune non paretur* (L. 20, Dig., *De jurisdictione*, 2, 1).

**248.** The right of imperium is exercised with respect to persons and to the territory and to things in the territory.

#### RIGHT OF IMPERIUM WITH REGARD TO CITIZENS

**249.** The right of imperium or sovereignty of the sovereign of the State with regard to citizens is based on the nature of citizenship and consists in his power to regulate by his laws the status of the state's citizens even in foreign countries—their personal status and legal capacity, their family relations and all rights arising from these relations, including the right to transfer property to legitimate heirs by gift or by will.

250. The sovereign of the State may also recall to the territory citizens residing abroad, when he deems their presence necessary for the defense of the country or for the performance of their military service.

251. The submission of a citizen to the authority of the sovereign of the state to which he belongs, arising as it does out of the very nature of citizenship, may be held to subsist until the citizen loses his nationality of origin by becoming a citizen of another state.

252. No sovereign may refuse to a citizen the right to expatriate himself and to acquire citizenship in another state. The previous authorization of the sovereign as a condition preliminary to the exercise of such right cannot be considered as based on *allegiance*.

The sovereign has the right, however, to demand that those who would wish to expatriate themselves shall first serve their time in the army in the country of their origin. Furthermore, he has the right to treat as a rebel anyone who has fought against his mother country.

Formerly, it was admitted that every individual was considered as attached to the sovereign of his mother country by *allegiance*, which was held to be in itself a permanent and everlasting bond which could not be broken by the person so bound without the consent of his prince.

It is by reason of this relation that the legislation of certain states provides for a permanent obligation of fidelity and obedience of a citizen towards the sovereign of his country of origin and denies him the right to expatriate himself and to become naturalized abroad without the consent of the sovereign. In some countries allegiance was considered as a relation so absolute and permanent that it was called inalienable and imprescriptible, notwithstanding the many personal facts to repudiate it.

Such was the case under the Swiss federal law previous to the Act of July 6, 1876, and under the English law previous to that of May 12, 1870, providing that an Englishman may forswear his allegiance by becoming naturalized abroad.

This relation, so far as it is considered absolute, inalienable and imprescriptible, must be held contrary to the international rights of man. Compare: Bonfils, *Droit international public*, § 423. [See also, Borchard, *Diplomatic protection of citizens abroad*, New York, 1915, §§ 4-5, 237-238, 316, 320-321—Transl.]

253. The sovereign may punish a citizen guilty of an offense committed on foreign territory, when he returns to his home territory and has not been tried and punished in the country where the offense was committed.

This power should be justly exercised when it involves offenses

of some importance, such as those involving punishment restricting personal liberty for not less than three years.

Without admitting that criminal law may assume with respect to the citizen the character of a personal statute, we may justify the punishment of the citizen who has debased the dignity of the national character abroad.

#### LIMITATION OF THE RIGHT OF IMPERIUM

**254.** The sovereign cannot, by virtue of his right of sovereignty over citizens, execute against them, while abroad, any coercive acts, either directly or indirectly, to compel them to obey him. Nor can he require the sovereign of the foreign state to recognize the authority of the laws enacted by him with respect to the said citizens, unless so provided in a special treaty.

#### RIGHT OF IMPERIUM AS REGARDS FOREIGNERS

**255.** Every foreigner entering the territory of a state is bound, so long as he remains there, to submit to the authority of the laws of public security, police and public order and to the municipal public law in general. He cannot complain if those laws are more oppressive than or different from those of his own country. He can only demand that there be no discrimination between himself as a foreigner and citizens of the state in the rules of procedure and the application of legal guaranties.

**256.** It cannot be considered as in conformity with the principles of law and international practice to subject foreigners who are not permanent residents to civil and military service, forced loans, war contributions and any extraordinary contribution imposed on citizens.

These charges may be imposed only on foreigners who are permanently domiciled in the state on the condition, however, that they be granted a reasonable time to transfer their residence elsewhere, if they are unwilling to submit to the application of oppressive laws promulgated since the establishment of their residence.

**257.** The sovereign of every state has the right to expel a foreigner on grounds of public policy or if his presence is harmful to the state. This right must be admitted especially with regard to the foreigner convicted of crime, when, according to territorial

law, expulsion is a collateral penalty attaching to criminal conviction.

We must also admit the right to expel the foreigner who, by general common law, would be subject to extradition, if the request for extradition is not made by the state concerned, either because of neglect on its part, or because of the absence of an extradition treaty.

Expulsion can never be ordered in the interest of private individuals, either to prevent legitimate competition, or to protect them from law suits instituted against them in the territorial courts or before competent territorial authorities, or for any other reason foreign to the public interest.

**258.** Expulsion of a foreigner ought always to be justifiable if he is found to be a beggar or in a state of vagrancy; if he has settled in the state secretly or under a fictitious name; if he is suffering from a contagious disease liable to constitute a menace to public health; if, by the life he is leading, he offends public morals, as in the case of prostitution or the practice of professions or trades forbidden by law; if through his illegal acts he endangers the domestic safety of the state or exposes the government to just claims on the part of friendly governments, thus imperilling the amicable relations existing between the two.

**259.** It is incumbent on civilized states to regulate by law the expulsion of foreigners, in ordinary as well as extraordinary cases, so as to prevent any arbitrary act by the executive power and to protect the personal liberty and inviolability of foreigners.

**260.** Expulsion of a foreigner by administrative decision may be justified in exceptional cases on serious grounds of public policy. Nevertheless, the expelled individual ought to have the privilege of entering a caveat against the administrative decision before a court, which would then be called upon to examine the circumstances upon which the expulsion was based. In all cases, we should admit the right of the government of the country of the expelled individual to demand and obtain explanations as to the reasons which brought about the expulsion and to require the observance of the rules of procedure laid down by municipal law.

See on this subject: Fiore, *Traité de droit pénal international*, translated by Charles Antoine, Paris, 1880, v. I, chap. 3: *Du droit d'expulser l'étranger*. There are mentioned in this chapter the laws in force in various countries relating to the expulsion of foreigners.

*Institut de droit international*, session of Hamburg, v. XI. See in that volume, the *Projet de réglementation de l'expulsion des étrangers*, by Feraud-Giraud. See also Oppenheim, *International law*, v. I, 2d ed., §§ 323-326, p. 399; [and Borchard *op. cit.*, §§ 27-32—Transl.]

**261.** The wholesale expulsion of foreigners may be justified only when, by their presence, they seriously disturb public order and tranquillity. This measure, therefore, may be maintained so long as the public necessities which caused it continue to exist. In time of war, the collective expulsion of foreigners may be justified by the necessity of protecting the national interests.

**262.** The foreigner must be served with a notice of his expulsion, and he must be given a reasonable time to leave the territory of the state. Coercive measures to carry out the order of expulsion are legitimate only after the expiration of this reasonable time or when the foreigner has failed to meet the conditions imposed upon him by the order of expulsion.

**263.** Expulsion ordered against a class of individuals or against all foreigners belonging to the same state should be subject to the rules of legal publication laid down by municipal law.

The interested parties should in principle be granted a reasonable time for the voluntary execution of the order of expulsion. Coercive measures should only be resorted to after this period has expired.

However, in certain exceptional and urgent cases, the expulsion may be carried out by the use of coercive measures directed against all individuals declaring themselves unwilling to comply with the order as published, especially when these individuals prepare to resist its execution.

**264.** The order of expulsion may also indicate the point of the frontier designated for leaving the territory, taking into account, so far as possible, the interests of the expelled individual.

The government may always keep the expelled foreigner under surveillance as far as the frontier, and if need be, oblige him to leave the territory on board a certain ship, so as to insure the execution of the order of expulsion.

#### RIGHT OF SOVEREIGNTY OVER TERRITORIAL WATERS

**265.** The territorial sea must be considered as constituting a part of the domain of the state to which the coasts belong. By



virtue of this eminent domain, every state has the exclusive right to provide for the security and defense of the territory of the State, the protection of the private interests of its citizens, the free carrying on of commerce, and the protection of the general and fiscal interests of the State.

No state can, however, assume the right to prohibit the in-offensive use of its territorial waters.

266. Every state has the exclusive right to regulate the patrol of navigation within territorial waters, the approach to the coasts, the entrance into ports, the obligation to take a local pilot, free pratique and all similar matters. It is incumbent upon it to establish a strict supervision so as to insure compliance with the laws and regulations by providing punishment for those who infringe them.

267. The right to fish and collect all under-water products within territorial waters may be reserved for citizens, except when treaties extend the fishing privilege to foreigners.

Fishing in territorial waters is generally regulated by commercial treaties and by special conventions covering the matter. In several treaties concluded by Italy, fishing in Italian territorial waters is reserved for her citizens. It is so stipulated in the treaty with Austria-Hungary of December 6, 1891, article 18, and in the treaty with Mexico of April 6, 1890, article 17, and others. The delimitation of the fishing limits in the bay of Mentone was determined by the convention of June 18, 1892, between Italy and France. There are many instances of treaties where the reservation of the exclusive right of citizens to fish in territorial waters is not stipulated. It is always necessary to refer to special conventions, to decide whether or not such reservation has been made. In principle, in the absence of a treaty of commerce, the privilege ought to be recognized as reserved to citizens. Compare Oppenheim, *International law*, I, § 187.

268. Let us suppose that by the law of a state fishing in territorial waters is reserved to citizens, and in a special treaty concluded with another state the right of fishing is granted to the citizens of that state. If, in the commercial treaty concluded with another state the right of fishing is not expressly reserved to citizens, and if the treaty contains the clause under which the contracting parties are assured the privileges of the most favored nation, the reservation based on the law granting citizens alone the right to fish in territorial waters should not be considered as impliedly renounced on the ground that the right of fishing has been granted in a treaty concluded with another state.

The French law of March 1, 1885 prohibits foreigners from fishing in the territorial waters of France and Algeria and reserves this right to French citizens. Now, let us suppose that a state, such as France, reserves fishing in its territorial waters to its citizens and that, afterward, by a treaty concluded with state A, it stipulates that fishing in the respective territorial waters shall be permitted under reciprocity to the citizens of the two contracting parties. Let us suppose, furthermore, that in a later treaty concluded with state B there is inserted the most favored nation clause. In such instances, could it be held that, by reason of such clause, the citizens of state B could claim the right of fishing conceded to state A? Derogations from the general law reserving fishing to citizens may only be sought in a special law, and as special laws derogating from the general law are strictly interpreted, it cannot be admitted that the derogation contained in the special concession to state A should apply to other powers. It would in fact require another special express provision in favor of another state to furnish a derogation in its favor, from the general law reserving fishing in territorial water to citizens.

269. The sovereign of every state also has the right to reserve the coasting trade to citizens. This right must be considered as reserved, whenever it has been established by law or custom and no derogation therefrom has been suffered by treaty.

The expression "coasting trade" denotes the transportation of merchandise and passengers between two parts of the same state. This trade as a rule is reserved exclusively for national ships. We believe, however, that as the right of free, peaceful navigation over the territorial sea is now conceded, the privilege cannot be sustained except by virtue of a special law of the state or established custom. The rule reserving the coasting trade to citizens is generally adopted in all European states; in Germany, by the law of May 22, 1881, in Spain, by the ordinance of July 15, 1870, and in France, by the law of April 2, 1889. In England, an order in council prohibits the coasting trade to vessels of countries which do not admit reciprocity. In the United States, foreign vessels are absolutely excluded from the coasting trade. On the other hand, in Belgium, the coasting trade is free because there is no law prohibiting it. In Italy, by the law of July 11, 1904, no. 167, the coasting trade is reserved to the national flag, provided no special conventions or treaties stipulate otherwise.

Compare: Oppenheim, *International law*, v. I, §§ 187-188.

270. The State has the right to regulate transit in territorial waters in order to provide for the necessities of its defense and to protect its fishing interests and to prohibit the transportation of certain goods (arms, ammunition, alcohol, etc.) and in general any transportation which may be suspected of violating the customs laws. It may, therefore, subject foreign vessels entering territorial waters to visit and inspection in order to prevent any violation of the laws and regulations against smuggling.

This rule may find application with respect to the trade in fire-arms, munitions of war and alcoholic drinks intended for Africa. Since experience has

proved that the importation of such goods greatly imperils the security of the states which exercise rights of sovereignty or protection in Africa; it was agreed that, independently of the agreement concluded under the general Act of the Conference of Brussels of July 2, 1890, any state could by law forbid the transportation of such merchandise in the territorial waters of its African possessions and declare it smuggling and punish it as such.

**271.** The right of control and patrol of a state over its territorial waters may be properly exercised by subjecting merchant vessels suspected of carrying on smuggling to the visit of its war vessels or those specially designated for the purpose, and by applying the penalties provided by law (fines, confiscation of merchandise, etc.) to those found guilty of that offense.

The application of police measures and regulations shall always be permissible in the territorial waters of any state for the protection of its fishing interests and the observance of its customs laws.

A special law is indispensable for the exercise of such a right; because the application of penalties is not, in principle, admissible without a statute. Great Britain has a special law on this matter, that of August 28, 1833, which prohibits the violation of customs regulations. Under this law, merchant vessels found in British territorial waters are considered as suspects whenever they deviate from their route to their port of destination and cannot justify such deviation by the condition of the weather and sea. They may be liable to penalties to the extent of confiscation of their merchandise, when they fail to comply with the notice to retire within 48 hours. In France, they apply the law of Germinal 4, year 2, article 7, title 11, which provides the penalty of confiscation of goods whose importation into France is prohibited, when these goods are found on board a merchant ship in French territorial waters, and which inflicts, besides, a fine of 500 francs on the captain of such vessel.

#### EXTENT OF THE TERRITORIAL SEA

**272.** By customary law, territorial waters extend three sea miles from low water mark.

Nevertheless, we must recognize the common advantage in extending the territorial sea to at least five miles from the coast, so as more effectively to safeguard the rights of the littoral states.

The three mile limit is at the present time considered as generally fixed to determine the maritime zone over which a state may exercise its jurisdiction. See Calvo, *Droit international public*, § 355, 4th ed., 1887. "This zone," he says "is the limit which has been generally recognized by international conventions, notably by article 1 of the treaty of October 20, 1818, between Great Britain and the United States; by the Belgian law of June 7, 1832; by articles 9 and 10 of the treaty of August 2, 1839 and article 1 of the treaty of November 11, 1867, between France and Great Britain.

To-day, the tendency is to extend the limit of the territorial sea especially

with a view to insuring a better defense, the necessities of which have grown greater by reason of the progress in the means of attack and the range of guns. Nevertheless, an international convention is needed to modify customary law. The government of the Netherlands, in 1895, took the initiative in negotiating for an extension of the territorial sea to six miles from the coast. This was also the proposition advanced by the Institute of International Law in 1894 at the Paris session.

**273.** No state can by a special law extend the territorial sea beyond the limits established by customary law.

If, however, a state has proclaimed by municipal law that its territorial waters in the matter of the exercise of police and fishing jurisdiction, are to be considered as extending beyond three miles (six at the utmost) and if the other states have not protested, the state's exercise of police jurisdiction and supervision of customs within the limits thus fixed cannot be disputed, unless a court of arbitration decides to the contrary.

Certain states have, in fact, extended the limits of the territorial sea from the point of view of the dominion which they claim over it. Great Britain proclaims and exercises its right of supervision to twelve miles from the coast. In France, the zone for the supervision of customs was carried to two myriameters by the law of March 27, 1817 (art. 13). We cannot admit, however, that the rules of international law can be modified by a unilateral act.

Nevertheless, we may observe that, on the one hand, the majority of publicists recognize the necessity of extending the territorial sea to at least five sea miles from the coast, and that, on the other hand, certain states, in fact, have by municipal law enlarged the limits of their territorial waters for the exercise of their jurisdiction. Under such circumstances of fact, it would seem that, although not admitting that a state may assume the right to modify by a municipal law the rule of international law relating to the width of the territorial sea without exposing itself to the just protests of the other powers, yet it may be said that everyone may rely upon the common opinion of writers and on fact, to practice what others practice. In this way, the adoption of a different customary law as regards the extent of the territorial sea may gradually be arrived at, or else, on account of the just protests of third powers, the necessity will arise of referring to the decision of an arbitral court the question as to whether or not a state may assign a greater extent to its territorial sea for the exercise of its jurisdiction. Of course, through its award, the Court would lay down a rule obligatory on all the states until such time as they may agree to establish rational rules for determining the extent of the territorial sea and their reciprocal rights in relation to it.

**274.** The territorial sea can be extended by a treaty designed to regulate the application of customs laws and the reciprocal right of supervision and control of the respective governmental authorities of the contracting states.

Such conventional extension should be deemed operative only between the contracting parties.

See the Anglo-American treaty of October 20, 1818, those between France and Great Britain of August 2, 1839 (arts. 9 and 10), and November 11, 1867 (art. 1), and the treaty between France and Mexico of November 27, 1886, by which it was agreed to extend respectively the territorial sea to 20 kilometers. Compare: Ortolan, *Règles internationales et diplomatie de la mer*, 1864, livre II, ch. VIII, v. I, p. 159. Pradier-Fodéré, *Droit internat. public*, v. II, § 633; Bonfilis, *op. cit.*, § 492. Cf. Oppenheim, *International law*, v. I, 2d ed., pp. 235 *et seq.*, §§ 176-197.

**275.** As regards bays, the distance of three sea miles shall be reckoned from a straight line drawn across the bay where its shores converge to a distance of six marine miles.

#### JUST LIMITATIONS OF THE RIGHT OF DOMINIUM

**276.** The eminent domain which every state has in its territorial waters cannot be considered as a right of property. Since its object is the security and the defense of the general and individual interests of its citizens, it must be limited by its purpose.

**277.** Every state is bound to exercise its right of domain over territorial waters in such a manner as not to injure the rights of vessels who make a peaceful and harmless use of such waters for the purposes of navigation. It is a universal right, in times of peace, freely to traverse territorial waters in order to reach the open sea.

**278.** No sovereign has the right to subject merchant vessels crossing territorial waters to the payment of fees, under any form whatever, for the right of transit or navigation, nor by law or regulation render transit oppressive and difficult.

#### RIGHT OF SOVEREIGNTY OVER PORTS AND ROADSTEADS

**279.** Every sovereign exercises dominion over his seaports. He can, therefore, by law and regulation, regulate the police of ports, anchorage, the loading and unloading of ships and the security and custody of goods. He can, moreover, require those who enter in order to transact business to pay dues for tonnage, light-house, port, pilotage and similar dues. Nevertheless, the more favorable treatment granted, under existing treaties, to the ships of certain countries must not be considered as contrary to international law.

**280.** It is the privilege of the sovereign of a state to declare

seaports open or closed to commerce. However, when they are declared open, the merchant vessels of all countries must, under the guaranties of international law, be permitted to enter, subject to the observance of territorial laws and regulations and the obligation to pay the necessary fiscal taxes and duties.

**281.** Every sovereign may, for reasons of public policy, forbid war vessels to enter the ports of the state. When he allows them to enter port and to remain in territorial waters, he may impose on them such conditions as he may deem appropriate.

**282.** In no case can the sovereign refuse entrance to ports, even those closed to commerce, nor to roadsteads, to vessels forced to take refuge therein by stress of maritime disaster or any other case of *force majeure*.

It is the duty of the State to consider such vessels as under the protection of international law so far as concerns the ownership of the vessels and cargoes, to treat them according to the dictates of humanity and, saving the precautions which might be deemed necessary to avoid and prevent imposition, to grant them, subject to the observance of local laws and regulations, the means to repair their damages and to do everything that may be necessary to enable them to proceed on their voyage.

The rules proposed with regard to ports are based on the just concept that ports are part of the public domain of the State, a fact which makes it necessary to admit the eminent domain of the territorial sovereignty with respect thereto and the right of such sovereignty to subject their use and enjoyment to certain conditions, especially the payment of certain dues to the Treasury.

Roadsteads are like natural ports; they must be considered as a dependency of the territory and the eminent domain which resides in the state must comprise them. The British Admiralty sought to include within the domain of Great Britain wide expanses of sea enclosed by the British coasts which it called "narrow seas," "King's Chambers." But such a claim is not justifiable. The rules concerning gulfs must be applied to roadsteads of considerable extent. In the treaty between France and Great Britain of August 2, 1839, relating to fishing in the English Channel, it is provided in article 5 that bays less than ten miles wide must be considered as dependencies of the territory.

#### RIGHT OF SOVEREIGNTY OVER GULFS AND LAKES

**283.** Gulfs should be considered within the eminent domain of the territorial sovereign when their width does not exceed the range of a cannon-shot. Otherwise, they must be assimilated to

the open sea, applying the rules governing the extent of and jurisdiction over territorial waters.

The rule proposed is based on the theory that every state must provide for its safety and defense. We must, besides, bear in mind that the sea cannot be considered as within the domain of any state because of the impossibility of acquiring exclusive possession of it. Now, this possession is possible with respect to gulfs where entrance and egress may be prevented by means of cross fire from the guns of a battery on the two opposite coasts. On the other hand, it is natural that in the absence of such circumstances, the gulf must be assimilated to the open sea by fixing the limits of territorial waters according to existing customary law, or at six miles, when that new distance proposed shall have been adopted by international convention.

**284.** The right of sovereignty over lakes situated on the boundary of two states extends, on the part of each riparian state, to the middle of the lake.

#### RIGHT OF SOVEREIGNTY OVER STRAITS

**285.** The right of sovereignty of the state in possession of both shores of a strait should be considered as limited to its power to patrol navigation therein and to do whatever is necessary for the safety and defense of the state.

**286.** No sovereign, by virtue of his power of control, can subject ships passing through a strait to the payment of passage and transit dues, or prevent the peaceful use of the strait. He can merely ask to be indemnified for the expenditures incurred to maintain the strait in a condition of navigability and to assure the safety of commerce.

Denmark for a long time imposed on merchant vessels crossing the Sund and Belt Straits on their way to the Baltic Sea, the payment of passage dues. These dues, fixed and recognized for the first time in the treaty concluded in 1645 between the Danish Government and the States General of the United Provinces of the Netherlands were later admitted by other states, especially by France in the treaties of 1663 and 1742. Subsequently, as the amount of the dues thus collected by Denmark exceeded considerably the expenditures of the navigation service and as those dues amounted to veritable taxes upon passage at the expense of international trade, just protests against this abuse, especially by the United States, resulted in a convention, March 14, 1857, between Denmark on the one hand and Austria, Belgium, France, Great Britain, Hanover, Mecklenburg-Schwerin, Oldenburg, the Netherlands, Prussia, Russia, Sweden and Norway, the Hanse towns of Lubeck, Bremen and Hamburg, on the other. Under this agreement the dues for passage were redeemed for the sum of 91,434,975 francs.

Compare the rules formulated in Book III, *On the liberty of straits*.

## RIGHT OF SOVEREIGNTY OVER INLAND SEAS

**287.** The right of sovereignty over inland seas is subject to the rules which apply to the high sea, except for modifications established by international treaties.

No sovereign can consider an inland sea to be within his domain, although he possesses all the coasts that surround it and the strait by which it communicates with the ocean, under the pretense of his power to prevent access thereto with his guns.

While the straits of the Bosphorus and the Dardanelles are under the domain of Turkey, she cannot consider the Black Sea as within her domain, even when she had possession of all the coasts bounding the sea.

See the various phases relating to that sea and the conventions signed to regulate its navigation in Bonfils-Fauchille, 3d ed., §§ 499 *et seq.*; see also the statements there in regard to the Baltic and Behring seas.

See also Oppenheim, *op. cit.*, v. I, p. 603:

"The declaration exchanged on May 16, 1907, between France and Spain, on the one hand, and on the other hand, between Great Britain and Spain, concerning the territorial *status quo* in the Mediterranean . . . [and that] concerning the maintenance of the territorial *status quo* in the North Sea, signed at Berlin on April 23, 1908, by Great Britain, Germany, Denmark, France, Holland, and Sweden . . ." [and another, of like date], signed at St. Petersburg by Germany, Denmark, Russia and Sweden "concerning the territorial *status quo* in the Baltic."

## RIGHT OF SOVEREIGNTY OVER RIVERS

**288.** The sovereign of every state has the right of sovereignty and domain over rivers and canals which, throughout their entire course, traverse the territory of the state. He may, consequently, determine the conditions under which foreign vessels may be allowed to make use of these waters for commercial purposes.

**289.** The right of sovereignty and domain over a river which crosses several states, resides in the state crossed by the river over all that portion of its course which passes through its territory. This right must always be exercised without impairing in any way the freedom of navigation and the rights of riparian states, which find themselves in natural community with respect to the use of the waters.

**290.** The right of sovereignty and domain with regard to a river which separates two states must be considered as belonging to each state up to the middle of the river, following the line called *thalweg*.

Compare the rules relating to navigable rivers and to territorial limits and boundaries in Book III.



## RIGHT OF SOVEREIGNTY OVER MOVABLES IN THE TERRITORY

**291.** Everything actually in the territory of the state, considered in itself and independently of the persons to whom it belongs, must be deemed subject to the right of imperium of the territorial sovereign.

**292.** The sovereign of the state has the right to regulate the legal condition and possession of things both personal and real, and the just limits to the free exercise of the right of property in its relations with general interests and with the protection of social rights and of the rights of third parties.

**293.** No right over property in the territory of the state can become effective except as a result of a law of the territorial sovereign and in conformity with that law.

No legal relation concerning things located in the territory of the state shall be held effective, if the result entails a derogation from the laws of public policy relating to property or from public municipal law.

Even when the right over a thing located in a country must be held to be based on a foreign law, such right may be effective as *jus ad rem*, but the real right proper, the *jus in re*, from which arises a real action, can be acquired only in conformity with the provisions of territorial law. In fact, the territory with all it contains must be considered as the basis and limit of sovereignty and of the real jurisdiction of any sovereign.

See *infra*, Book III, *Property belonging to private individuals, in its relation to international law*. Compare: Fiore, *Diritto internazionale priv.*, 4th ed., v. I, parte generale, cap. III, p. 100: *Della legge che deve regolare i diritti reali*; Diena, *I diritti reali considerati nel Diritto internazionale privato*, Torino, Unione Tip.-Editrice Torinese, 1895.

**294.** No act of execution upon things located in the territory of the state can take place either by virtue of a foreign law, or of a contract made in a foreign country, or of a judgment pronounced by a foreign court. It is necessary that the acts of execution be previously authorized by the territorial sovereign in conformity with his municipal law.

The executory force of acts rests solely upon the sovereign power possessed by the sovereign of the state where the executory acts must take place. It is, in fact, by reason of the order given in the name of the sovereign to his public officers that the latter may carry out the execution. It is evident, therefore, that, as the right of imperium belongs exclusively to the territorial sovereign, the exercise of imperative power on the part of a foreign sovereign cannot be admitted.

## TITLE XI

### RIGHT OF JURISDICTION

#### JURISDICTION AS A RIGHT OF THE SOVEREIGN

**295.** Jurisdiction which, by international law, belongs to the sovereign of each state, consists in the faculty to exercise the judicial power and to submit to the courts legally established by him differences between persons relating to their reciprocal rights and obligations, to the exercise of their rights over things, and to questions of all kinds which must be referred to the decision of the competent judges.

In order to distinguish jurisdiction as a right of the state, from jurisdiction and competence as powers assigned to judges, compare rules 206-208.

#### JURISDICTION OF COURTS IN CRIMINAL MATTERS

**296.** Jurisdiction of courts in criminal matters must be considered as based on criminal law, which has, in principle, an impersonal and absolute territorial authority.

Whoever, in the territory of the state or in places assimilated to it, commits an offense under the law must be indicted and punished by a sentence of a competent judge.

#### JURISDICTION EXERCISED BY THE COURTS OVER GUILTY PERSONS

When, however, the author of an offense committed on the territory of the state happens to be a foreigner who has already been tried by the courts of his country, it should be considered in accordance with the principles of equity and international justice, when necessary to prosecute him, to take into consideration the penalty already pronounced by the foreign courts.

The jurisdiction of the courts of the state of the place where the offense was committed cannot as a rule be denied. But if the concurrence of the territorial and extraterritorial jurisdictions is admitted, as is done in certain

cases, it is necessary for the legislature of each country to determine, in accordance with just principles, when the prosecution should be resumed and in what measure account should be taken of the penalty already inflicted and suffered. Compare: Fiore, *Effetti internazionali delle sentenze penali, materia penale*, Turin, Loescher, 1877, ch. III, and *Droit pénal intern.*, translated by Charles Antoine, Paris, 1880.

#### EXTRATERRITORIAL AUTHORITY OF CRIMINAL LAW AND COMPETENT COURT

297. Criminal law can have extraterritorial authority only when the violation of the right protected by the law is the result of an offense committed in a foreign country.

In such case, the right of the sovereign of the state to bring the offender before his courts and to punish him in accordance with his laws must be admitted.

It is important not to confuse the extraterritorial authority of criminal law with the institution of a criminal action, which is the immediate consequence and effect of that law. The extension of the authority of criminal law to offenses committed abroad which violate certain rights cannot be considered contrary to the principles of international law and to the reciprocal independence of states. Such a principle would certainly not justify the institution of a criminal action in a foreign country, but only the jurisdiction of the courts of the state with respect to the offender, with the power to pronounce against him the penalties provided for the legal protection of the right violated.

Compare: Fiore, *Effetti internazionali delle sentenze penali e della estradizione*, ch. II: *Della giurisdizione penale relativamente ai reati commessi all'estero*, n. 12 et seq.; and *Traité du Droit pénal international*, translated by Charles Antoine, v. I: *Du droit de réprimer les délits commis hors du territoire de l'Etat*, n. 43 et seq., Paris, 1880.

298. Extraterritorial authority may be assigned to criminal law with regard to the following offenses:

- a. Offenses against the safety of the state and public credit;
- b. Offenses against property or persons, when the criminal has gone to a foreign country where the offense is not punished in order to perpetrate it in fraud of the law of the original country which declares such act to be punishable.
- c. Receiving stolen goods, when the objects stolen in the state have been fraudulently carried into the territory of another state;
- d. Complicity on the part of an individual living abroad, who has by order, advice or inducements led the offender to commit the offense in the state.

**299.** Every state has criminal jurisdiction over any act considered an offense according to international law.

Such offenses are:

- a. Piracy and any act relating thereto;
- b. The destruction or injury of submarine cables or of any portion of the apparatus belonging thereto;
- c. The destruction or injury of an international railroad, or of canals or public works intended for the common use of states, committed willfully in time of peace or by an unauthorized person in time of war.

#### PIRACY IN RELATION TO CRIMINAL JURISDICTION

**300.** By piracy we understand any violent act committed on the high sea for the purpose of robbery or depredation, by a ship not provided with a license or letters of marque emanating from a recognized government, and when the offense is directed indiscriminately against the ships of any country.

Compare: Oppenheim, *International law*, v. I, §§ 275, *et seq.*

**301.** We cannot characterize as piracy the acts of a ship which has been commissioned by a government to commit acts of violence or depredation against the ships of a certain country, even though the captain of the ship may have exceeded the terms of his commission. Nevertheless, the author of such acts should be held responsible, even criminally, for having exceeded the limits of his commission, and in like manner, the government which commissioned him must always be considered responsible.

**302.** When, on board a ship carrying the flag of a recognized nation, mutinous members of the crew commit acts of plunder, depredation, murder and assault, such facts cannot be characterized as acts of piracy and the ship must remain subject to the jurisdiction of the state whose flag she flies. When, however, the mutineers, having assumed command of the ship, have broken off all relations with the home state and have ceased flying its flag, the acts committed by them would be deemed acts of piracy according to rule 300.

See Phillimore, v. I, 357, stating a case which took place in Chilean waters and to which the present rule may apply.

**303.** International criminal jurisdiction for the crime of piracy can be admitted only when the act charged meets all the conditions necessary to piracy under the principles of international law.

The municipal law of a state which denominates as piracy certain acts not considered to be such by international law, cannot be applied against aliens to assign to those acts a piratical character and justify the jurisdiction of the state which enacted the law.

Piracy in international law must not be confused with the crime of piracy so qualified under the municipal law of a state. Thus, for example, under British law, any British subject is considered a pirate who, in time of war, aids or assists at sea the enemies of the king or who transports slaves on the high seas. (See Stephens, *Criminal Law*, arts. 104-117.) It goes without saying that under this law, only British subjects who violate the laws of their sovereign can be sentenced for piracy.

Compare: Oppenheim, *International law*, § 280.

**304.** The pirate ship, whether or not she flies the flag of a state or keeps log-books, is subject to the jurisdiction of any state that has her in its power.

**305.** Whoever possesses proof that a ship is guilty of piracy, or has serious reasons for suspecting her, has the right to seize her, but must conduct her into the port of a state for trial.

If the acts of piracy were committed in the territorial waters of a state, the jurisdiction of that state should be recognized in preference to any other.

#### CRIMINAL JURISDICTION OVER TERRITORIAL WATERS

**306.** It is incumbent upon states to determine in common accord the extent of territorial waters with respect to criminal jurisdiction.

In principle, the complete assimilation of territorial waters to the landed territory, from the point of view of the authority of criminal law over offenses committed in the said waters and the resulting criminal jurisdiction, should not be admitted.

**307.** In the absence of an international agreement, every state can by law establish rules for the exercise of criminal jurisdiction over offenses committed within its territorial waters.

In Great Britain, this matter is regulated by a law of 1878 (*An act to regulate the law relating to the trial of offenses committed on the sea within a certain dis-*

tance of Her Majesty's dominions, 41 and 42 Vict., c. 73). Article 7 of this law reads: "And for the purpose of any offense declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

This law was enacted following the discussions arising out of the collision owing to negligent navigation of the German ship *Franconia*, at a distance of about three sea miles off the English coast. The killing of a sailor having been proved and charged against the captain of the vessel, the claim was made that the English law was applicable and that the High Court of Admiralty had jurisdiction of the case. At that time, that is in 1877, no statute relating to this matter existed in Great Britain and the discussions involved the general principles of law. Phillimore, a judge of the High Court, held, with much reason, that from the point of view of criminal jurisdiction, territorial waters could not be assimilated in all matters to the landed territory. [See *Regina v. Keyn*, 2 Ex. D. 63.]

At the time of the debates on the law of 1878, the principle which it was intended to sanction was bitterly opposed both in the House of Lords and in the House of Commons. In the latter, the law was opposed by Sir George Bowyer. Phillimore persistently held that the British Parliament could not establish a criminal jurisdiction in opposition to international law, and that was the opinion held by the Lord Chief Justice.

**308.** It must always be considered in conformity with the most just principles of international law to admit the criminal jurisdiction of the state over offenses committed in territorial waters within a mile from the coast measured from low water mark, and beyond that limit, to assimilate territorial waters to the high sea from the point of view of criminal jurisdiction.

This rule is based on the idea and ultimate purpose of the penalty. The political alarm and damage which justify the penal sanctions necessary for the legal protection of violated rights, cannot arise from acts which are committed at a great enough distance from the coast to exclude any idea of threatening the public safety of the territory of the state.

#### CRIMINAL JURISDICTION OVER MERCHANT VESSELS

**309.** Criminal jurisdiction over merchant vessels for offenses committed thereon, must be assigned to the state which gives the vessel its nationality. This jurisdiction holds, even when the ship is in foreign territorial waters and ports, provided, however, that the offenses committed on board have no exterior consequences and do not affect the patrol of territorial waters or territorial public order.

**310.** The territorial sovereign has criminal jurisdiction whenever

the offenses, even if committed on board a foreign vessel, have or may have external consequences.

This is illustrated principally in the following cases:

- a. When an offense, although committed on board among members of the crew, may endanger the public safety or tranquillity;
- b. When the offense was initiated outside the ship and terminated on board;
- c. When the commander of the vessel is unable to prevent or punish the offense and requires the intervention of the local authorities.

311. With regard to serious offenses against "common" law which are committed on board without having any exterior consequences, the territorial state may be granted the right to intervene in order to proceed with the necessary preliminary examinations to preserve the proofs and the *corpus delicti*, reserving the surrender of the guilty person to the courts of the state to which the vessel belongs, in order that he may be tried in conformity with the law of that state.

The French Court of Cassation said in the Jally case: "In view of the fact that merchant vessels, entering the port of a nation other than that to which they belong, cannot be subjected to the territorial jurisdiction whenever the interests of the territorial state are involved, without danger to the public order and dignity of the Government. . . ." (Cass. Feb. 25, 1859, *Journal du Palais*, 1859, 420.) See the comments of the reporter and the note. Cf. the decisions of American courts in Fiore: *Diritto intern. pubblico*, 4th ed., v. I, §§ 513 *et seq.* and Calvo, *Droit intern.*, §§ 462 *et seq.* [see Wildenhuis' case, 120 U. S. 1].

312. Before undertaking to assume jurisdiction of foreign vessels in territorial waters, the local authorities must advise the consul or consular representative of the state to which the vessel belongs and undertake no act without his intervention, whenever conveniently possible.

This rule is based on the general principle of international law that consuls are the natural protectors of the citizens of the state which has appointed them and of their commerce. Article 12 of the consular convention between Italy and France reads as follows: "It is agreed that judicial officers and customs officers and employees shall not conduct examinations, visit or search on board vessels without being accompanied by the Consul or Vice-Consul of the nation to which the vessel belongs; they shall also give opportune notice to said consular officers in order that they may be present when captains or members of the crew of vessels make depositions or declarations before the

courts and local administrative authorities, in order thus to avoid any error or misinterpretation which might interfere with the proper administration of justice.

The citation which for this purpose shall be served upon the Consuls or Vice-Consuls shall indicate a certain day and hour, and if the Consuls or Vice-Consuls fail to appear, personally or by a representative, the proceedings shall continue in their absence."

#### CRIMINAL JURISDICTION WITH REGARD TO WAR VESSELS

**313.** A war vessel is one of any form and size authorized under the law of the state to which she belongs to fly the military flag and placed under command of an officer of the navy.

**314.** The territorial sovereign cannot exercise jurisdiction over a war vessel which, with its consent, has entered territorial waters; nor can it interfere with acts which occur on board the vessel, even when very serious offenses are committed on board by members of the crew.

The state has the right merely to require the observance of the conditions under which it has granted permission to enter its territorial waters.

**315.** The commanding officer of a foreign war vessel which enters territorial waters to perform an act violative of the rights of the state, under the orders of his government, shall not be personally subject to criminal jurisdiction therefor.

The territorial sovereign must consider the state to which the vessel belongs as responsible and may do everything necessary for the national defense and protection of its rights. It may, accordingly, treat the vessel as an enemy vessel.

**316.** A foreign war vessel which, without commission or tacit authorization of her government, has entered territorial waters in order to perform acts in violation of the rights of the state, may be subjected to the jurisdiction of the territorial sovereign. The latter has the right to prosecute the offenders, or to demand that they be punished by the state to which the vessel belongs and may consider the vessel as a material instrument and treat her as an enemy. That sovereign cannot, however, hold the state responsible by applying to it the laws of war, when it is proved that the foreign government was not aware of the criminal designs of the ship's commander or had done its best to prevent their execution.



See the decisions of the Court of Aix, of August 6, 1832, and of the French Court of Cassation, of September 7, 1832, in the celebrated case of the ship *Carlo Alberto*, and the important speech of Tupin for the prosecution in *Journal du Palais*, 1832, p. 1457. See also the diplomatic correspondence between the government of Sardinia and the two Sicilies in the well known case of the ship *Cagliari* in June, 1857, and Fiore, *Droit pénal international*, v. I, no. 15.

**317.** The government can subject foreign war vessels which enter the territorial waters of the state to the laws governing health, harbor rules and the rules of navigation.

**318.** The territorial sovereign always has the right to exercise criminal jurisdiction over the crew of a foreign war vessel for offenses committed by them on land, provided however, that the local authorities succeed in arresting the guilty persons before their return on board the vessel or the ship's boat.

So long as the person accused of an offense against "common" law, although a member of the crew of a foreign war vessel, is on the territory of the state, the right of the territorial state to arrest such person in order to arraign him before its courts and to punish him in conformity with "common" law cannot be limited.

Compare the decision of the French Court of Cassation February 29, 1868, in the case of the sailor *Der*, of the British sloop of war *Pearl* and the important speech of the Public Prosecutor in the *Journal du Palais*, 1868, p. 905.

**319.** The territorial state may exercise criminal jurisdiction over a foreign war vessel in its territorial waters whenever there occur on board offenses with respect to which the criminal law is assigned an extraterritorial authority, and it is consequently urgent to arrest the offender and to prosecute the ship's commander so as to make sure of having him.

The exercise of jurisdiction must likewise be admitted when the commander of the foreign vessel himself requests the intervention of the local authorities; or when the commander has lost his authority, owing to a mutiny of the crew which may greatly endanger the public peace and security.

Our rule tends to maintain in its legal sphere the privilege of extraterritoriality recognized by international law in favor of war vessels. No other jurisdiction can, in principle, be admitted over such a vessel, which is a floating fortress, except that which belongs to the naval commander and which he exercises by virtue of the laws of the state to which the vessel belongs. This commander represents the sovereign of his state, which consequently excludes any act of sovereignty by a foreign government. Nevertheless, it may be

found necessary to limit the privilege of extraterritoriality by its very purpose. Let us suppose that the commander of a war vessel in territorial waters should take advantage of his situation to commit grave offenses on board, such as the falsification of the state's seals, money or bonds of its public debt, or that the war vessel should become a refuge where "common" law offenses are committed (excitation to revolt by means of publications secretly printed). It would be impossible in such cases to deny the sovereignty of the state thus offended the right to repress such offenses and to punish their authors.

The same rule would govern if the commander had lost his authority; or if a mutiny had broken out rendering the commander powerless to assert his authority and the war vessel were therefore in a state of anarchy.

**320.** In the cases covered by the foregoing rule, the state to which the vessel belongs may request that the offenders, who are in the custody of the territorial authorities, be delivered to it for trial by its own courts; but it must request and obtain their extradition.

#### JURISDICTION OVER ISLANDS

**321.** Criminal jurisdiction of offenses committed on islands which do not belong to any state should be assigned to the state of which the offender is a citizen.

#### ORDINARY JURISDICTION OVER MERCHANT VESSELS

**322.** Jurisdiction over foreign merchant vessels which enter territorial waters or ports must be assigned, in principle, to the sovereign of the state to which such waters or ports belong.

It is incumbent upon foreign merchant vessels to recognize the authority of the police laws and all regulations there in force relating to:

- a. The entrance and departure of vessels;
- b. Anchorages and moorings;
- c. The embarkation and landing of passengers;
- d. The loading and unloading and storing of goods and ballast;
- e. The use of signal lights and precautions against fire;
- f. Everything relating to the police and security of the port or roadstead and its dependencies.

**323.** It is incumbent upon the territorial sovereign to extend equal treatment in the application of the relevant laws and regulations, to foreign vessels entering an open port, subject to exceptions which may arise from treaties.

That sovereign, moreover, must allow the authorities of the country to which the vessel belongs to exercise their powers with respect to the vessel in conformity with applicable treaties and "common" law.

This rule refers to the exercise of the powers of consuls and consular agents with respect to the merchant vessels of their country. Under the Italian consular law (art. 26), Italian consuls may inflict on Italian seamen disciplinary punishment for breaches of discipline committed by them on board; they have, besides, other duties under Italian laws and regulations.

**324.** The laws of the state to which the ship belongs must govern her legal status everywhere as an object of property, with regard to her valid transfer, the obligations and responsibility of her owners, and the relations between her commander and crew, except for the rules of private international law which must govern private relations and the rights acquired over the ship by creditors in the country where she may happen to be.

The foregoing rules are based on the principles expounded by writers and on the decisions of the courts, as more fully set forth in the following works:

Fiore, *Trattato di diritto internaz. pubblico*, 4th ed., 1905, v. II, §§ 984 *et seq.*, and 2d ed. translated into French by Charles Antoine, Paris, 1885, §§ 535 *et seq.*; *La nave commerciale nei suoi rapporti col Diritto internazionale*, in the periodical *La Legge*, 1882 (theoretical and practical studies), p. 317; 4th ed. of the aforesaid work: *Trattato di Diritto internaz. pubblico*, v. I, §§ 513-520, and v. II, §§ 984 *et seq.*; Calvo, *Droit internat.*, v. I, §§ 459 *et seq.*

At the Congress of Antwerp of 1885, the following rule was adopted: "The powers of the captain to provide for the pressing needs of the vessel, to mortgage or sell her, or contract a bottomry loan are determined by the law of the flag, except that, in matters of form, he must be governed either by the law of the flag or the law of the port where the transactions are undertaken."

**325.** The powers of the captain, both with respect to the persons on board the vessel and to the vessel herself and the measures and acts which he may prescribe or order for purposes of navigation, must be determined by the national law of the vessel; subject, however, in matters relating to the exercise of such powers in territorial waters, to compliance with the special provisions of the local law.

Compare the opinion of the French Council of State of November 20, 1806, with respect to the offenses committed on the American ships the *Newton* and the *Sally*, and Vincent, *Dictionnaire de droit international privé*, v. I, 1887-1889, word *Navire*, p. 616.

**326.** All disputes of a private nature which may arise between the captain, members of the crew and persons not connected with

the vessel, are within the jurisdiction of the territorial state or of the state to which the vessel belongs, according to the principles of "common law," and all questions relating to the payment of dues, taxes and duties owed by the foreign vessel, are to be settled by the territorial jurisdiction in conformity with the rules of "common law" in force in the country where the vessel is located.

#### JURISDICTION RELATING TO MAIL STEAMERS

**327.** Vessels engaged in the postal service, whether they belong to the state or to a private concern, must be considered under the protection of international law with respect to all matters concerning the postal service.

Jurisdiction over mail steamers must be governed by the rules established by treaties. In the absence of treaties, it must be exercised within just limits and with the restrictions which, under "common" law, must be considered as inherent in the service and in the international interests likely to suffer from a lack of regularity in the mails.

**328.** It should be deemed more conformable to "common" law to assimilate mail steamers to war vessels than to merchant vessels and to refrain from any assumption of jurisdiction over or police measure against them which is not based upon urgent necessity.

**329.** A government which, without grave and urgent reasons, delays the sailing of a mail steamer, may be held liable for the actual damages incurred through the delay by private individuals.

In several conventions, mail steamers are assimilated to war vessels.

In the postal convention between Italy and France, of March 3, 1869, the following provision may be found (art. 6): "When mail steamers employed by the postal authorities of France or Italy for the carriage of mails in the Mediterranean are national vessels owned by the state or vessels chartered or subventioned by the state, they shall be considered and received as war vessels in the respective ports of the two countries to which they ply regularly or occasionally, and they shall enjoy therein the honors and privileges of war vessels.

"These mail steamers shall be exempt in the said ports, both in entrance and departure, from all tonnage, navigation and port dues, unless they load or discharge cargo in which case they shall pay the same dues as national vessels. They shall, in no case, be deviated from their destination, nor be subject to detention, embargo, arrest or restraint of princes."

**330.** No mail steamer can claim the attentions and privileges

due her by reason of her postal character, when she has abused her position to evade or violate the laws and regulations in force in the foreign port which she has entered as a mail steamer.

Such would be the case of a mail boat which had attempted smuggling; or had received on board, in territorial waters, offenders, fugitives from justice; or which, after it had received them on board at some other point, should attempt to land them in the territorial waters of the state; or if it had in any other way abused its position to violate the customs, or criminal or police regulations.

In such cases, the local authorities who contemplate assuming jurisdiction over a foreign mail steamer, must advise the consul of the state to which such vessel belongs and invite him to be present.

**331.** It is incumbent on every government to compel the mail steamers of the state entering foreign territorial waters to observe the laws and regulations enacted by the territorial sovereign, and to refrain from protecting mail steamers which violate or attempt to violate them, and to file no unjustified claim when as a result of the violation of such laws and regulations, the steamers cease to enjoy the privileges guaranteed them. •

#### JURISDICTION OVER FOREIGN SOVEREIGNS

**332.** Foreign sovereigns who, as such, are in the territory of a state, cannot, as such, be personally subjected to its jurisdiction.

If, however, sovereigns should abuse their position to foment disorder, or to attack the security of the state, they may be forced to leave the territory and if they commit hostile acts of exceptional gravity, may be treated as prisoners of war.

The principle of extraterritoriality is opposed to subjecting to the criminal jurisdiction of the state foreign sovereigns, transiently resident, who may violate the local laws. Nevertheless, the injured state has the right not only to prevent, if need be by force, a criminal act, but even, if it has been accomplished, to seize the offender and to hold him until reparation or indemnity has been obtained. It may even answer an attack upon its existence and integrity by a declaration of war (Heffter, *Droit international*, § 102).

**333.** A sovereign who, in a foreign country, undertakes civil or commercial acts which, by their nature, cannot be considered as political acts, but rather as private acts, may be subject to the local jurisdiction according to the rules which govern the exercise of jurisdiction with respect to a sovereign in matters of private law.

The following may be considered as coming within this rule:

- a. The case of a sovereign who has acquired realty in a foreign country;
- b. The case of a sovereign who becomes a manager of public utilities or undertakes commercial acts (e. g., the management of a railroad, chartering of a ship for carriage of freight, etc.)

**334.** We may consider as subject to the state's jurisdiction a foreign sovereign who voluntarily submits to it.

The following cases may be considered as coming within this rule:

- a. The case of a sovereign who has enlisted in the army of a foreign state;
- b. The case of a sovereign who has commenced an action as plaintiff, without appointing an attorney-in-fact to represent him and to answer the counterclaims of the defendant.

The rules proposed are based on the just principle that transactions of private law and the relations which arise therefrom, cannot materially differ according to the status of the persons between whom such transactions take place. Whenever the sovereignty cannot be considered to be actually involved, the fundamental reason against a sovereign appearing before the local courts disappears.

In an action against the Khedive of Egypt, who had chartered his public vessel for the carriage of freight, the jurisdiction of the courts was admitted. See the decision of the British High Court of Admiralty of May 7, 1873, in the *Journal du droit international privé*, 1874, p. 36. [This case, *The "Charkieh,"* 4 A. and E. 59, was an action in rem, although the Court actually held that the Khedive, by engaging in the shipping business, was not entitled to the immunities of a sovereign prince—Transl.]

In the *Hullet* case, begun by the King of Spain in the character of a sovereign, as plaintiff, without appointing a public officer to represent him, the American (*Sic*) courts declared they had jurisdiction over him. (*The King of Spain v. Hullet*, Reports of Lords, vol. I, p. 333.) [This case, decided by a British court, really held that a foreign sovereign Prince, though entitled to sue in his political capacity, stands on the same footing as ordinary suitors as to the rules and practice of the Court, and is bound, like them, to answer a cross-bill personally and upon oath. 1 Cl. and Fin. (1833), p. 333.—Transl.] Compare: Fiore, *Diritto pubblico internazionale*, 4th ed., v. I, §§ 493 *et seq.*, and the words *Agenti diplomatici* in *Digesto italiano*.

[To the effect that a state by bringing suit does not thereby abandon its sovereignty and subject itself to an affirmative judgment upon a counterclaim see *People v. Dennison*, 84 N. Y. 272; *U. S. v. Eckford*, 6 Wall. 490. As to inadmissibility of executing the judgment against a foreign sovereign, even if he has submitted to the jurisdiction in the matter of a counterclaim against him, see the important case of *von Hellfeld v. Russia*, decided by the Prussian

Court for the determination of Jurisdictional Conflicts, June 25, 1910, printed in Amer. Journ. of Int. Law, v. 5, pp. 490-519.—Transl.]

**335.** The sovereign of a state cannot be subjected to civil jurisdiction on account of acts undertaken as head of the state, even though these acts may violate the rights of foreigners and they may claim the jurisdiction of their national courts.

Jurisdiction, considered as a right of the state, cannot extend to the actions of a foreign sovereign as such without implying the submission of one state to another. See, the suit entered by Madame Masset, who had summoned the Czar before the French Courts, for an arbitrary act for which she held him responsible, Paris, August 23, 1870, *Journal du Palais*, 1871, p. 73.

See also the Solon case. Mr. Solon, having been instructed by the Khedive to open a school at Cairo, sued this Prince for damages arising out of his arbitrary dismissal. This case is reported by Phillimore in the appendix to his first volume.

**336.** A deposed sovereign who no longer effectively exercises supreme power, cannot legally perform any act of government. Therefore, if he should undertake such acts and thereby cause injuries to individuals, he could not claim immunity from the local jurisdiction in actions brought against him by the persons he has unjustly injured.

See the suit brought against the former Duke of Modena who, after his fall, had quite a number of political prisoners transferred to the fortress of Mantua and kept there as prisoners, notwithstanding the loss of his sovereign power. The suit brought against the ex-Duke by the prisoners, who demanded damages for their arbitrary imprisonment, came before the Italian courts.

See the decision of the Court of Genoa of August 6, 1869, and that of the Court of Cassation of Turin of July 8, 1871, which recognised the competence of the courts with respect to the acts performed by the ex-Duke since he had, by virtue of the plebiscite, lost his sovereignty.

#### JURISDICTION OVER FOREIGN STATES

**337.** The foreign state, as a political entity, when performing acts of government in the exercise of its functions and sovereign rights, cannot be subjected to the jurisdiction of the country of which the persons claiming to have been injured by such acts are citizens.

The responsibility of the state for acts done in its name must be governed by the rules concerning the international obligations of the state in its relations with foreign states.

Compare rules 223-226.

**338.** Those acts of administration performed by a foreign government, which by their nature must be considered as within the domain of civil relations, must, so far as their litigious consequences are concerned, be subject to the ordinary jurisdiction of the courts and to the rules of procedure.

In order to understand fully the importance of the two foregoing rules, it must be noted that the state may be considered from a double point of view, as a political entity and as a juridical person. From the former point of view, the acts it performs always imply the exercise of sovereign power and must be governed by public and constitutional law for their internal consequences and by international law for their external consequences. They are, therefore, not within the local jurisdiction. The case is quite different as regards acts performed by the state as a juridical person. It has, as such, the power to bind itself, to contract, to acquire property in a private capacity, to incur debts, and to perform all the acts of civil life just like any other juridical person. Now since, in these acts, sovereignty is not in question, and since by their nature, the said acts must be considered as within the domain of private law, it follows that the principles which must govern them, as well as the civil consequences and legal actions to which they may give rise, are those of private law. Thus, a deed of sale does not change either its nature or character, according as the contracting parties are both private persons or one of them is a corporation, a foundation, a state or a foreign government. Compare: Court of Cassation of Rome, joint sitting, May 30, 1869. *Comune di Firenze v. Pontonari*, *Foro italiano*, 1879, 1190.—Cass. of Florence, November 27, 1879, *Lucchi v. Comune di Firenze*, *id.*, 1879, 1072.

It is, therefore, undeniable that the rules of "common" law relating to contractual obligations, so far as their consequences and the legal actions to which they may give rise are concerned, must be applied even to a foreign government which has contracted in the fiscal interests of the state it represents.

It is according to that distinction that we have already shown in our article under the words *Agenti diplomatici* in the *Digesto italiano* (v. II, p. 915, no. 217) that we may determine when to admit or deny jurisdiction with regard to foreign governments.

**339.** All acts must be deemed within the domain of civil relations which by their nature do not affect the personality of the state as a political institution, but which concern it rather as a corporation.

Such are:

- a. The acts and contracts concluded for the purpose of administration, e. g., the operation of public works;
- b. The acquisition of real or personal property under contract either by private title or by way of universal succession to or by legacy from a private individual;



- c. Acts relating to industrial or commercial undertakings, for their effects in the territory of a foreign state;
- d. All similar acts, for the effects they may produce in private international relations, provided they do not affect the political personality of the foreign state.

**340.** Whenever the competence of territorial courts over acts performed by a foreign government is admitted, the rules of "common" law in force in the country where the action is brought must be observed in all matters relating to practice and procedure, as in the case of civil actions brought against the state as a corporation.

**341.** Judgment rendered against a foreign state shall not be carried into effect by forcible execution upon its property or revenues; but diplomatic channels must be resorted to in accordance with the rules of administrative procedure, save in cases where the foreign state in its private capacity possesses property in the country where the judgment was rendered.

This proposed rule is based on the just idea that the same rules cannot be applied to the property of the state and to that of private persons, when we deal with forcible execution against the property. State property is intended for the satisfaction of public needs, and it is easy to understand that ordinary methods of execution must be deemed inconsistent with the administration of the property of the state and the ultimate use of its funds and revenues.

The obstacle which inevitably stands in the way of executing a judgment against a foreign state does not constitute a decisive argument to defeat the jurisdiction itself. The right of a plaintiff to request a competent court to render a judgment and to find against the foreign state cannot be denied, notwithstanding the fact that after having obtained the judgment he cannot enforce it except in the forms and under the conditions prescribed by constitutional and international law.

Compare the decision of the Court of Lucca, of March 22, 1887, *Hampson v. Bey of Tunis*, *Foro italiano*, 1887, I, 474. [See also the exhaustive opinion of the German court in *Hellfeld v. Russia*, printed in *Amer. Journ. of Int. Law*, v. 5, pp. 490-519.—Transl.]

**342.** It must always be considered proper according to the *comitas gentium*, in the case of judicial proceedings against a foreign government, to make all possible efforts to settle the difficulty by diplomacy. If, however, the government of the foreign state refuses to recognize the claims of the plaintiff and declines to settle the case through administrative channels, the institution of an action brought against the state cannot be opposed.

## JURISDICTION OVER FOREIGN MINISTERS

**343.** Foreign diplomatic agents shall not be subject to the territorial jurisdiction for acts performed by them as such, while invested with the public character of representatives of a foreign government. If, however, their acts involve civil consequences and obligations, the rules concerning acts of *gestion* or administration performed by a foreign government must be applied in all matters relating to judicial proceedings and the competence of courts.

By virtue of this rule, it must be admitted that a foreign minister cannot be held personally responsible even for the civil consequences of acts performed by him as a diplomatic agent and representative of a foreign government. Nevertheless, we must admit the right of a foreign minister, authorized to provide for the needs of the legation, to conclude a lease of a residence for the legation or to furnish the residence. In this and in similar cases, since he acts as a representative of his government, it is natural that the civil consequences of his acts come under the above mentioned rules concerning acts performed by a foreign government.

**344.** The foreign minister who, in the exercise of his functions as such, offends the sovereign or his government, cannot be criminally prosecuted; his recall only may be requested, or his passports given him.

It is always incumbent on the state represented to disavow the acts of its minister and to offer to the offended state the satisfaction to which it is entitled. Otherwise, it would assume responsibility for the acts committed by its minister as its representative.

**345.** When a foreign minister performs an act which is clearly of a hostile character, the government of the state to which he is accredited may detain him until the government he represents has recognized the justice of its complaint and until the pending difficulty has been settled by diplomacy.

If that difficulty should lead to war between the two states, the foreign minister may be detained as a prisoner of war.

In principle, the foreign minister, in so far as he represents the state and performs acts as such in the name of his government, cannot be held personally responsible for his acts, since by reason of his representative character he is acting in the name of the foreign state. Hence it follows that when such acts give rise to a difficulty between the two governments, it must come under the general rules governing disputes between states.

**346.** Diplomatic agents who, in the state where they reside, perform acts in no way connected with their character as public officers or representatives of a foreign government, but which, by

their nature, must be considered as within the domain of civil and private relations, may, with respect to all the consequences of those acts, be rendered subject to the territorial courts, save for such concessions as are necessary to protect the dignity of the represented state.

The purpose of the foregoing rules is to determine exactly the scope of the privilege of extritoriality enjoyed by the representatives of foreign states.

Leaving aside legal fictions, it must be recognized that, from the nature of things, the representative of a foreign state being endowed in all his acts with a public character, cannot be subject to the jurisdiction of the state to which he is accredited. He represents, in fact, the very person of the sovereign, and he cannot be subject to the local jurisdiction, because, since this is inseparable from the local sovereignty, his submission to territorial jurisdiction would be equivalent to making the sovereign he represents a dependent of the sovereign of a foreign state.

It was, therefore, very properly that the Court of Paris, in the *Massé* case, expressed itself as follows: "Inasmuch as the reciprocal independence of states is established by international law . . . ; and to undertake to subject to the local jurisdiction the sovereign of a foreign country, i. e., to the jurisdiction and orders of a judge of another country, would be a manifest injury to a foreign state and violate to that extent the law of nations . . . ; and the incompetence of the court was in that respect a matter of public policy and absolute. . . ." (Paris, August 23, 1870, *Journal du Palais*, 1871, p. 73.)

Thus, it is not under the fiction of extritoriality but under the principle of the reciprocal independence of states, that foreign ministers must be exempted from territorial jurisdiction for all acts performed as representatives of the state which has accredited them.

In private legal relations, it cannot be maintained that they must be exempt from territorial jurisdiction, because these relations are always identical whether they are contracted between two private individuals or between an individual and a foreign minister.

Sale, rent or deposit do not change their nature, character or substance when a foreign minister assumes the part of seller, buyer, lessor, lessee, depositor or depositary. See Fiore: *Agenti diplomatici*, in the *Digesto italiano*, §§ 171 *et seq.*; *Diritto internazionale pubblico*, 4th ed., v. II, §§ 1194-1229. Compare: Féraud-Giraud, *Etats et souverains devant les tribunaux étrangers*, v. II, Paris, 1895, Appendix.

**347.** Diplomatic agents who criminally violate the rights of private parties are subject to the criminal jurisdiction of the state to which they are accredited, save for such concessions as are necessary to protect the dignity of the represented state.

Oppenheim, *International law*, 2d ed., v. I, §§ 301 *et seq.*

#### JURISDICTION OVER FOREIGN CONSULS

**348.** Foreign consuls are not subject to territorial jurisdiction for acts performed by them as public officials, according to the

laws and regulations and the functions assigned to them by the consular convention and agreements concluded between the two states.

If, however, these acts should have civil consequences and justify a civil action against their home government, the competence of territorial courts could be admitted under the rules relating to the jurisdiction over foreign governments and states.

In order that this rule may be fully understood, it is necessary to recall that public officers, although not personally responsible for acts performed in their capacity as public officers, may under certain circumstances involve the responsibility of the state.

This question was argued before the Italian courts, in consequence of a promise made by the consul of Greece, as such, to pay the sums due to the Aversa insane asylum where he had requested the confinement of an insane Greek woman. On request of the management of the asylum, the Italian courts declared themselves competent. The Court of Cassation of Naples, in its decision of March 16, 1886, decided that the foreign consul (and through him the government to which he owes his office) cannot be considered as immune from the jurisdiction of the courts of the state with regard to the obligations contracted in Italy in providing, as a consul, for the needs of his countrymen (*Giurisprudenza italiana, Typaldos, consul of Greece v. Manicomio di Aversa*, 1886, *Parte I, sezione I*, 228).

See also the judgment of the Court of Catania, of August 16, 1888, in *Leva v. Belfiore, Giurispr. catanese*, 1888, p. 189.

**349.** Consuls engaged in commerce or performing acts of private business are in these matters fully subject to the commercial or civil jurisdiction of the country in which these transactions are undertaken.

Even when, under a consular convention, the respective consuls must enjoy, under reciprocity, certain privileges, exemptions, prerogatives and immunities, it cannot be maintained that they may benefit by them when they are engaged in business or perform acts governed by private law.

In the protocol signed by Italy and Roumania to fix the exact scope of the consular convention concluded between them, it is provided: "It is understood that the respective consuls of the two countries, if they engage in business, shall be entirely subject, in so far as concerns provisional detention in commercial transactions, to the legislation of the country in which they act as consuls." (Bucharest, March 13, 1881, *Collezione dei trattati e convenzioni tra l'Italia e gli Stati stranieri*, v. X, p. 799.)

**350.** The state must regulate the exercise of its jurisdiction and the rights of the local authorities with respect to foreign consuls with the consideration and regard due them by reason of their public character; it must also assure them the enjoyment of all the rights, immunities, privileges and exemptions which are granted them by the consular convention or under "common" law.

351. It must be admitted, in principle, that while consuls cannot enjoy all the rights and privileges granted to diplomatic agents, they are, nevertheless, entitled to all the guaranties of their personal security, to entire liberty properly to perform their duties, and to the effective co-operation of the local authorities for the execution of the measures they are bound to take in order to perform their duties.

In most consular conventions, while not recognizing the exemption of consuls and consular agents from the territorial jurisdiction, the principle is admitted that they cannot be subject to arrest unless they are guilty of serious offenses. In the convention of May 15, 1874, between Italy and Austria, article 5 reads as follows: "Consuls general, consuls, vice-consuls and consular agents, subjects of the high contracting party which named them, shall enjoy personal immunity from arrest and imprisonment, unless the offense, if committed in Austria-Hungary, is considered a crime or punished by a grave penalty, or, if committed in Italy, is affected with a criminal penalty."

The same provision is contained in the consular convention between Italy and Russia of April 16, 1875, under which arrest is permitted only when the offenses are punishable by a penalty of more than one year's imprisonment. (Convention of April 16-28, 1875, art. 2, sect. 2.)

To complete these rules, see *infra*, the rights and prerogatives of consuls.

## TITLE XII

### EXTRITORIALITY

**352.** Extritoriality is a form of privilege or exemption consisting of a limitation of territorial sovereignty with regard to certain persons and certain places, which under international law enjoy the privilege of remaining outside the jurisdiction of the state in whose territory they are situated.

The word *extritoriality* expresses inadequately and vaguely the exceptional situation in which certain persons and objects find themselves with respect to territorial law. Taking the word in its literal meaning, it might be supposed that it means that the persons enjoying extritoriality are in the same situation as those who are outside the territory, and that objects must be considered as not part of the territory, which is entirely wrong. The fact is merely that certain persons and things, because of an exception based on international law, are outside of the general rules of territorial law. Therefore, the jurisdictional power of the territorial sovereign is to be regarded as limited with respect to what is comprised in the exception, and in that respect persons and things must be considered as if they were outside the territory of the state.

All authors are now agreed on the true meaning of the word. Compare: Fiore, *Nuovo diritto internazionale pubblico*, 1st. ed., 1865, p. 582; *id.*, *Effetti internazionali delle sentenze e degli atti*, parte 2, §§ 412 *et seq.* (Torino, Loescher, 1877); *id.*, *Trattato di Diritto internazionale pubblico*, v. I, p. 372 (Torino, 1879); Laurent, *Droit civil international*, v. I, 51-83; Bar, *Theorie und Praxis*, v. II, 509-526, *Lehrbuch*, § 77; Heffter, *Droit international*, § 42; Rivier, *Principes du droit des gens*, v. I, § 67, p. 330; Bluntschli, *Droit international*, rule 135; Bonfilis, *Droit international*, § 337; Oppenheim, *International law, Extritoriality*, v. I, 2d ed., *Monarchs*, pp. 429-431, *of diplomatic envoys*, 460-463.

We have fully explained the principles which should govern extritoriality in *Digesto italiano*, word *Agenti diplomatici*.

#### PERSONS WHO ENJOY THE PRIVILEGE OF EXTRITORIALITY

**353.** The privilege of extritoriality extends:

- a. To sovereigns;
- b. To diplomatic agents invested with the character of representatives of a foreign state;
- c. To the Pope;
- d. To citizens who live in countries subject to the system of capitulations.

**354.** Exterritoriality, with respect to the persons who enjoy it, cannot signify that they should be considered as not actually in the territory of the state; it merely implies a limitation of the right of local sovereignty with respect to such persons, to safeguard their independence or to protect their rights.

Compare: Delepouille, *Exposé théorique de la fiction d'exterritorialité par rapport aux personnes*, 1897; Pietri, *Etude critique sur la fiction d'exterritorialité*, 1895, pp. 68 et seq.

#### SOVEREIGNS AND FOREIGN DIPLOMATIC REPRESENTATIVES

**355.** The sovereign cannot exercise jurisdiction over foreign sovereigns who are temporarily in the territory of the state, nor with respect to diplomatic agents so far as concerns acts performed in their character as representatives of the foreign state. These agents can only be subject to local jurisdiction with respect to acts having no connection with their public character, but which must be considered as within the domain of private legal relations.

Compare rules 333-338.

#### THE POPE

**356.** The Pope must be considered personally inviolable and not subject to the jurisdiction of the territorial sovereign with respect to all acts he happens to perform in the exercise of his supreme authority as head of the government of the Church and of the ecclesiastical hierarchy and priesthood.

**357.** No government can without violating the independence and international liberty of the Pope, impute legal liability to him and subject him to its own jurisdiction in order to nullify the exercise of his spiritual powers, which he ought to be able to use with absolute freedom, e. g., promulgating the dogma, the principles of the faith and the rules of discipline and worship.

#### PERSONS SUBJECT TO THE SYSTEM OF CAPITULATIONS

**358.** Foreigners living in countries where Capitulations are in force must be considered as outside the jurisdiction of the territorial sovereign in the cases provided for by the Capitulations themselves,

by treaties or by customary law; they must submit to the jurisdiction of their national consuls and consular agents, whose duty it is to settle their difficulties in conformity with the rules of the Capitulations, treaties or established custom.

**359.** The limitation of the jurisdictional rights of the territorial sovereign delegated by convention to the authority designated must be considered as an exception and must not extend beyond the cases and circumstances expressed or contemplated in the Capitulations. Consequently, capitulations must, in so far as they are derogatory to the rules of "common" law, be interpreted and applied in a restrictive sense, just like any special and exceptional law restricting the free exercise of the rights of the territorial sovereign.

**360.** The privilege of extraterritoriality, which can be enjoyed under Capitulations, is personal and cannot be so extended as to cover consular districts in the countries where such Capitulations are in force and hence citizens of different states there resident.

**361.** The public legal relations between the foreign sovereign who exercises extraterritorial jurisdiction and the territorial sovereign, with respect to acts performed in the consular district, must be governed by the principles of "common" law, it being admitted that the consular district cannot be considered as territory of the state which exercises jurisdictional rights by virtue of the Capitulations.

As regards the relations of individuals, the rules of private international law must be applied, except for such derogations from these rules as are contemplated in the Capitulations, treaties and customary law.

The purpose of the foregoing rules is to determine clearly the extraterritoriality resulting from the system of Capitulations. Capitulations, in reality, constitute derogations from "common" law, since under them the territorial state suffers a considerable limitation in the exercise of its jurisdiction and is obliged to permit the foreign state to exercise jurisdictional rights with respect to its citizens residing in the territory.

It cannot be inferred, however, that the territorial state is deprived of eminent domain and imperium as if the consular district were no longer a part of the territory of the state. This district must merely be considered as an appendage of the territory of the foreign state which, by reason of the Capitulations, exercises jurisdictional rights over its citizens residing in the consular district.

An application of our rule was made by the French courts with reference to the form of celebration of marriage and to the observance of the rule *locus regit actum*. Thus, the French Court of Cassation said: "The fiction of extra-



territoriality which arises from the Capitulations, so far as concerns Frenchmen residing in the Levant, cannot in consequence necessarily impose on them the obligation of subjecting themselves to the French law in respect to all acts they may perform in that country (Cass. April 18, 1865, *Journal du Palais*, 1865, p. 770).

The same view was taken by the Court of Cassation of Turin in its decision of July 29, 1870 (*Monitore dei Tribunali*, 1870, 749).

See also the decision of the Court of Cassation of Rome, November 26, 1888, in the Russo case. The Court decided that the offense committed by an Italian citizen in a country where the consular jurisdiction is recognized (Smyrna), while subject to Italian laws and justiciable by Italian courts, could not be considered as an offense committed in the kingdom, but rather in a foreign country. *Foro italiano*, 1889, part 2, p. 3; and Pomodoro, *Le capitazioni e la giurisdizione consolare negli scali del Levante*, in the magazine *La Legge*, 1889, v. I. Compare, Fiore, *Diritto internazionale privato*, 4th ed., v. I, § 240.

**362.** The régime of Capitulations and the resulting limitations upon the jurisdiction of the territorial sovereign should be considered as abrogated in fact and in law:

- a. When the country where the Capitulations are in force is annexed to an independent state;
- b. When it ranks by reason of its civilization with civilized countries;
- c. When it is under the protectorate of a civilized state.

This principle may be considered as established, since all governments have agreed that Capitulations cannot remain in force in countries where the Musulman administration has been replaced by Christian civilized states (as happened at Massaua), or by the protectorate of a civilized state (as was the case in Tunis).

In the treaty of June 26, 1884, between Italy and Korea, the following provision is found (article 11): "It is declared and established that the right of territorial jurisdiction over Italian subjects in Korea conceded in this treaty shall be relinquished by the Italian government when in the opinion of the said government the laws and legal procedure of Korea shall have been so modified and reformed as to overcome all the objections which now prevent the submission of Italian subjects to Korean jurisdiction, and when Korean judges shall have been invested with the same legal functions and the same independent position as Italian judges." [The extraterritorial jurisdiction of the United States has been relinquished in Korea since 1905.—Transl.]

#### PLACES WHICH ENJOY THE PRIVILEGE OF EXTRITERRITORIALITY

**363.** The privilege of extraterritoriality is assigned:

- a. To the offices of foreign legations and to the consular archives;
- b. To the buildings intended as the usual residence of the min-

isters and diplomatic agents accredited to the sovereign of the state;

- c. To the places where a foreign army is quartered;
- d. To the buildings used for the habitual residence of the Pope, for the Administration of the Holy See, for the meeting of a conclave or of an ecumenical council, or for the offices of the pontifical congregation.

**364.** The sovereign of the state has no right to exercise any jurisdictional act over the places which enjoy extraterritoriality. Consequently, he cannot proceed to search a dwelling, or examine any papers, documents or records, or undertake any other act of investigation in such places.

**365.** The territorial state cannot, however, be considered as completely deprived of eminent domain over the places possessing the privilege of extraterritoriality. It can only be considered as deprived of the exercise of its jurisdiction according to "common" law.

Extraterritoriality has been considered as a legal fiction, under which persons who may claim the enjoyment thereof, are to be considered as outside territorial jurisdiction, as if they were not (although in fact they are) in the territory of the state. With regard to places, it has come to be decided, always because of the fiction, that they must be considered as if they were not in fact a part of the state. This legal fiction was accepted by the old writers. Grotius was among the first to hold that diplomatic agents *sunt quasi extra territorium* (L. II, cap. XVIII). Nowadays, it seems more reasonable not to accept such an exaggeration and it is not considered necessary to resort to legal fiction in order to justify the limitation of territorial jurisdiction. It is held that such limitation must be considered as based on the general principles which govern the reciprocal independence of states and these principles render it indispensable to restrict the exercise of jurisdiction with respect to certain persons and places, for the safeguarding of the reciprocal security of states and international relations.

#### EXTRATERRITORIALITY OF LEGATIONS

**366.** That part of the legation where the archives are kept and everything relating to the legation's office, including the documents and objects incident to the public service of the diplomatic representative, must be considered as absolutely outside the jurisdiction of the territorial state.

The building used as a residence by the diplomatic representative must in like manner be considered as outside territorial jurisdiction.

As regards minor buildings such as kitchens, stables and others of a similar nature, the limitation of local jurisdiction cannot be considered as absolute, but must be deemed subject only to certain immunities based on proper consideration due to a foreign minister.

This rule seeks to give to the privilege of extriterritoriality its proper limitations. It implies in principle a partial relinquishment by the state of its territorial sovereignty. The restriction, within the limits ascribed to it, must be considered absolute. It constitutes, however, an exception and, as such, must be given strict interpretation according to the general principles of law. "Every state," said Portalis, "has the right to look to its preservation, and in this right resides sovereignty. . . . This sovereign power cannot be limited, either as to persons or as to things. It is nothing, if not complete. . . ." (*Code civil suivi de l'exposé des motifs*, II, p. 12.)

Under the exaggerated view of extriterritoriality, it was conceived that the foreign legation was a part of the foreign state represented, and it was held that the territorial sovereign should be considered as deprived of any right of jurisdiction. Calvo goes so far as to deny jurisdiction in criminal cases over any offense under "common" law committed in the legation building, even by persons of no official character, such as servants and clerks (4th ed., §§ 1540-1541). There is no profit in further discussion. We favor the absolute exception, restricted within its purposes.

Compare: Fiore, *Agenti diplomatici*, in *Digesto italiano*, § 6; *id.*, *Effetti internazionali delle sentenze penali*, §§ 417-418, and the authors there cited; Rivier, *Principes du droit des gens*, v. I, pp. 330; Heffter, § 205.

We have always maintained that it is never possible to act in all matters concerning a foreign minister without due regard for the dignity of his office. Therefore, it must be considered essential to make all possible concessions, and the local authorities should always refer the matter to the Minister of Foreign Affairs. Be that as it may, we cannot admit that the territorial sovereign can be considered as deprived of all right and power over the building used as a residence by the foreign diplomatic representative.

#### ASYLUM

**367.** Diplomatic agents must not make use of the legation building to shelter persons in it from the jurisdiction of the territorial sovereignty and must not abuse the privilege of extriterritoriality.

In case abuse of privilege can be fully and conclusively proved, the diplomatic agent's home government must be held responsible.

**368.** Foreign diplomatic officers cannot be regarded as forbidden to grant asylum to persons accused of political offenses, or to protect them in their personal safety from the local government.

Any measure by the local authorities against persons who have taken refuge in the residence of a foreign minister is to be con-

sidered contrary to those principles of international law which justify the protection extended in all civilized countries to political offenders.

**369.** Nevertheless, the foreign minister cannot carry the protection of political offenders to the point of giving them refuge in his residence to plot against the government and combat the political institutions of the state.

**370.** The foreign accrediting government must see that its legation is not used as an asylum for plotting against the government of a friendly state, and for want of vigilance in that respect it shall be held responsible as in any other case of violation of proper diplomatic relations.

Asylum by legations to political offenders is generally admitted; but to use it in order to facilitate attacks upon the safety of the state would be immoderate.

Compare, Calvo, *Droit international*, v. III, § 1521; Oppenheim, *International law*, v. I, 2d ed., p. 461; Moore, *Asylum in legations and consulates and in vessels*, 1892.

#### CRIMINAL PROCEDURE AND JURISDICTION

**371.** The local authorities should never be permitted to search the residence occupied by a foreign diplomatic officer. In the matter of the legation offices and other buildings attached to the legation, although they are not used for his residence or dwelling, the local authorities should not be able to act as they would with regard to private individuals, merely following the rules of "common" law; they must also take into account the exceptions properly based on the consideration due to the representative of a foreign state.

**372.** If justice should require a search in order to arrest a criminal who has taken refuge in the residence of a foreign minister, his consent must be obtained, or the good offices of the Minister of Foreign Affairs must be sought to obtain such consent.

Local authorities can merely adopt the immediately necessary measures to prevent the escape of the accused person and to assure the regular course of justice.

**373.** If, by reason of very exceptional circumstances, it should be necessary to search a foreign minister's legation against his will, it would be necessary first to establish the grave reasons requiring

such a measure and to make them known to the foreign minister, so as to give him time, if desired, to remove all documents and papers relating to his mission. The search should take place with great moderation, supposing it to have but one purpose, the arrest of the offender.

The foregoing rules tend to correct the erroneous idea that the house of a foreign minister can be considered as an asylum for criminals and can completely escape the jurisdiction of the territorial sovereignty. The consideration due the representative of a friendly state ceases when that officer attempts to take advantage of it to protect offenders against the law. Calvo mentions various cases which corroborate the established rules. The Duke of Ripperda was arrested in the house of the ambassador at Madrid. The Swedish authorities surrounded the house of the British ambassador at Stockholm, who had refused to deliver up a criminal who had taken refuge there. Calvo, *Droit internat. public*, §§ 513 et seq.

See Fiore, *Effetti internazionali delle sentenze penali e dell' estradizione*, § 417; *Droit pénal international*, v. I, § 27, and the article under the head *Agenti diplomatici* in *Digesto italiano*, § 6, notes 243-264.

**374.** If it should be necessary to try a criminal for a crime committed in the house of a foreign minister, the jurisdiction of the territorial state must be deemed entire and absolute as in any other case of offense committed in the territory of the state.

#### CIVIL ACTS PERFORMED BY LEGATIONS

**375.** Acts affecting the civil status performed in legation buildings by persons attached to the legation or by others, cannot be considered as having taken place in the territory of the foreign accrediting state.

Consequently, we must apply to marriages performed in the legation or consulate the principles of "common" law which govern marriages celebrated abroad, and to regard those performed there as valid only when the parties are both citizens of the country to which the legation or consulate belongs, subject to the exceptions provided for by treaty.

Under the rules established by treaty, it is generally agreed that when the prospective husband and wife are nationals of the country of the diplomatic agent or consul, their marriage can take place at the legation or consulate in accordance with the formalities required by their national law, and that marriages so performed must be considered valid everywhere. Besides, it is a general rule of customary law that it is permissible for contracting parties to follow in a foreign country the forms of their national law, when that law is common to all the parties. In such case, they may claim that the act so performed is valid so far as its form is concerned.

Owing to the extritoriality of legations, it was believed, furthermore, that a marriage performed at the legation could be considered as performed in the country to which the legation belongs and therefore that the forms required under the law of that country could be followed by all. To-day, however, the principle set forth in our rule prevails.

See the decision of the civil tribunal of the Seine in reference to a marriage performed at the British Embassy in Paris between a Frenchwoman and an Englishman: "In view of the fact," said the Court, "that although the legation of an Embassy should, according to international law, be regarded as the territory of the state which accredits the ambassador, this is only so from the point of view of the immunities granted by treaties to diplomatic officers, but that this fiction of extritoriality cannot be extended to include acts affecting the civil status of inhabitants of the country to which the ambassador is accredited; it was therefore in France and on French territory that Morgan and Miss French were when they contracted marriage on November 23, 1867. . . ."

Tribunal de la Seine, Nov. 23, 1867. Clunet, *Journal du droit international privé*, 1874, p. 71. See, for diplomatic correspondence on the subject, Fiore, words *Agenti diplomatici*, in *Digesto italiano* and *Diritto internazionale pubblico*, 4th ed., v. II, §§ 1231 *et seq.*

#### HOW THE PRIVILEGE OF EXTRITORIALITY MAY BE LOST

**376.** Persons who enjoy the privilege of extritoriality for certain acts may lose that privilege by abusing it and violating territorial law.

Such abuse must, however, be conclusively proved.

**377.** The privilege of extritoriality possessed by certain places may be lost when it has been misused for a purpose different from that for which it was granted. Such misuse must, however, be definitely established and clearly proved.

**378.** The sovereign of a state who is unable definitely to establish the abuse of the privilege of extritoriality and nevertheless performs some act of jurisdiction over a person or in a place enjoying extritoriality, assumes international responsibility for that unlawful act, which should, in principle, be characterized as a manifest violation of international law, subject to the rules which govern the international responsibility of states.

The violation of extritoriality should in principle be considered as a violation of international law which may legitimate all the measures appropriate for redressing violations of that law. It must be said, however, that as extritoriality depends upon the urgent need of effectively protecting the purpose for which it was established, should such purpose as to certain persons and places happen to be wanting, the privilege itself would cease to exist. An abuse of the object for which extritoriality is admitted, would justify the extension of the local jurisdiction to the abusing person or place. The great difficulty

consists in fully and clearly proving the abuse of extrititoriality. In its absence, the extension of local jurisdiction could not have any other character than that of a violation of international law.

EXTRITERRITORIALITY OF CONSULATES

**379.** Consulates cannot be considered as covered by the privilege of extrititoriality; but the consular archives are removed from the local jurisdiction of the territorial state.

**380.** Consuls must provide a special place for the safe keeping of all consular and administrative documents, giving previous notice to the authorities of the country and indicating the place selected for such deposit.

Consuls must also keep in a separate place the books, papers and documents which relate to commerce and industry and any other documents relating to their personal affairs and having no connection with their official duties.

**381.** The local authorities cannot, in principle, undertake any act of jurisdiction in that part of the consulate which contains the consular archives, nor proceed to any search or seizure of the official documents, papers and objects connected with the service or functions of the foreign consul.

**382.** Consuls should not take advantage of the inviolability of their archives to remove from the local jurisdiction, documents and objects, etc., requested by the local judicial authorities, nor make use of the said archives for a purpose different from that for which they were intended. In case of proved abuse, the judicial authorities may prescribe the measures best adapted to the proper administration of justice. They must, however, exercise their jurisdictional powers with the respect due to consuls and resort to diplomacy to recall those officials to the observance of their professional duties.

In the agreement concluded between Italy and France, on December 8, 1888, to interpret article 5 of the consular convention of July 26, 1882, relating to the inviolability of consular archives, it was stipulated:

"Art. 1. The words 'consular archives' apply exclusively to the files of official documents and others directly connected with the service, as well as to the place designated for their safe keeping.

"Art. 2. Consuls general, vice-consuls and consular agents are expressly forbidden to place documents or objects not having that character in the rooms or files set aside for the archives.

"The rooms or room used for this purpose shall be absolutely distinct from

those used for the private residence of the Consul and cannot be used for any other purpose."

For the details of the difficulty which arose between Italy and France with respect to a seizure made in the archives of the consul of France at Florence, see Fiore, *Diritto internazionale pubblico*, 4th ed., Appendix, p. 651.

#### EXTRITERRITORIALITY OF PLACES SET APART FOR THE HOLY SEE

**383.** All places set apart for the government of the Church and in which the Holy See exercises its spiritual powers and functions, are removed from the territorial jurisdiction, that is, the places selected by the Pope for his permanent or temporary residence, those used for the establishment of the congregations and other high ecclesiastical offices, and those where a conclave or an ecumenical council convenes.

**384.** The extraterritoriality of places set apart for the Holy See must be considered entire and absolute. The local authorities, therefore, with respect to such places, must refrain from every act of jurisdiction in all matters which concern the exercise of the power and functions of the high administration of the church by the ecclesiastical authorities. Searches, investigations, or seizures of papers, documents, books or registers in the offices intended for the pontifical congregations must, therefore, be forbidden in every case.

**385.** It is incumbent upon the ecclesiastical authorities to prevent the places assigned to the Holy See from being used as an asylum for the protection of offenders against "common" territorial law, or to insure safety to those persons who might seek to use such places to commit serious offenses against the security of the state.

Exemption from jurisdiction under the rules of territorial law must be regarded as absolute and unrestricted so long as the object for which the privilege was established subsists; but it must be considered as abrogated when that purpose ceases and its termination is clearly proved.

**386.** When the local authorities deem themselves justified, in order to safeguard the internal security of the state, in undertaking acts of jurisdiction in the places assigned to the Holy See, it is incumbent on them to act with moderation. Consequently, any impairment of the privilege of extraterritoriality can be admitted



only within the limits strictly necessary to guarantee public safety and to insure the authority and enforcement of the local police and criminal laws.

Article 7 of the law of May 13, 1871, relating to the prerogative of the Pope and of the Holy See reads as follows: "No public officer or agent may, in order to perform his duties, enter the palaces or places of habitual residence or temporary abode of the Sovereign Pontiff, or in which a conclave or an ecumenical council is meeting, unless he is authorized by the Sovereign Pontiff, conclave or council."

By this article, it is indirectly admitted that the public authorities, in exceptional circumstances, may exercise their powers of jurisdiction in the places enjoying the privilege of extraterritoriality. It is true that the authorization of the Pope, conclave or council, is a condition precedent to the exercise of jurisdictional acts; but such condition must be considered as established to insure the respect due to the Holy See, and also because it cannot be presumed that the ecclesiastical authorities would ever refuse the authorization of proceeding according to law, when they recognize that the necessities of justice require it.

#### CORRECT VIEW OF THE EXTRITERRITORIALITY OF THE HOLY SEE

**387.** The privilege of extraterritoriality enjoyed by the places set apart for the Holy See cannot result in assigning to these places the legal status of territory subject to the sovereign rule of the Pope. Therefore, while the Sovereign Pontiff may freely exercise spiritual jurisdiction, he cannot, in these places, perform jurisdictional acts implying the exercise of the powers of political sovereignty.

The foregoing rules must serve to determine the true legal domain, within whose limits the rights of jurisdiction of the territorial sovereignty are exercised. The extraterritoriality of the places designed for the use of the Holy See must be considered as absolute within its purpose. It tends to assure to the Pope complete freedom and independence with respect to all matters concerning the government of the Church and the exercise of his powers and functions, and in that respect such freedom and independence cannot be limited. Freedom of government implies the freedom and independence of the ecclesiastical authorities entrusted by the Pope with the high administration and government of the Church. It must be admitted, therefore, that these authorities, in so far as they exercise their powers and functions as delegates of the Pope, must be completely exempt from the ordinary jurisdiction and command of the territorial sovereignty. The extraterritoriality of the places assigned to the congregations and offices charged with the high administration of the Church must be held to be absolute.

Nevertheless, it must be observed, that for the exercise of the high administration and government of the Church, it has been necessary to occupy several buildings located in various sections of the city of Rome and that the Vatican is in itself a great space which comprises, besides the portion assigned to the

habitual or temporary residence of the Pope, great buildings where a great many persons live (about 20,000) who do not share in the exercise of spiritual power and the majority of whom are Italian citizens. Now, it certainly cannot be admitted that all these buildings and such an extensive portion of the city can be considered as not in fact a part of Italian territory, regarding such places, dwellings and persons as absolutely exempt from the territorial sovereignty, just as if we were dealing with a foreign territory subject to the power of a foreign political sovereignty.

The territorial state exercises its power first of all by imposing its laws on the persons who live in the said places and who perform acts in their private and civil law relations. Consequently, so far as private acts are concerned, the people who live in the Vatican are considered as living on Italian territory and as recognising in fact the authority of the Italian law, when, for example, they wish to marry or to perform any other civil act.

As regards disagreements which may arise by reason of acts performed in the Vatican and which do not concern the administration of the Church, but the property and private interests of people, the competence of the Italian courts cannot be questioned. It is not possible to attribute to the head of the Church the power to create courts to decide civil law cases.

The competence of the Italian courts was recognized in fact in the Martinucci-Theodoli case by decision of the Court of Appeal of Rome of November 9, 1882 (*Foro italiano*, 1883, I, 663).

In case it should be necessary to punish "common" law offenses committed in the places set apart for the use of the Holy See by people not connected with the government of the Church, the jurisdiction of the territorial state could not be questioned. We may admit that, in order to assure the freedom of government of the church, those who, while exercising the functions assigned to them, have abused their powers, can be held accountable to the head of the Church; but, beyond all doubt, private persons guilty of "common" law offenses could not be tried and punished by the Pope, whence the necessity of recognising the criminal jurisdiction of the territorial sovereignty with respect to such offenders.

**388.** The violation of the extrterritoriality of the places assigned to the Holy See must be considered as a violation of the rules of international law; it would justify the collective legal defense of that law on the part of other states.

Granted that the independence of the head of the Church and the extrterritoriality of the Holy See must be considered as based on "common" international law, the respect or violation of extrterritoriality cannot be conceived as questions of territorial interest.

#### PLACE WHERE A FOREIGN ARMY IS QUARTERED

**389.** The privilege of extrterritoriality should be assigned to the place where a foreign army is quartered, and the territorial state should not exercise its jurisdiction in such a place as long as the said army remains there. Jurisdiction, both as regards military

and "common" law offenses, committed within the limits of the encampment, resides exclusively in the sovereignty of the state whose army is quartered there.

**390.** The said extrterritoriality cannot limit the rights of the territorial state, nor the exercise of its jurisdiction as regards persons belonging to the foreign army who have violated the territorial laws and ordinances, outside the limits of the encampment.

**391.** The territorial authorities are bound to deliver over to the military authorities, without any formality, persons belonging to the army, who, having committed an offense within the limits of the encampment, have taken refuge in the territory of the state.

**392.** The military authorities must deliver over to the local authorities persons who are wanted for a "common" law offense, and have taken refuge within the encampment.

## TITLE XIII

### THE LEGAL EQUALITY OF STATES

**393.** Every state has the right to be considered in international society as the equal of others in all matters relating to its legal capacity, the exercise of all rights derived from sovereignty and the fulfillment of its obligations.

**394.** The large or small extent of territory, population, or economic and military power cannot in any degree affect the legal equality of states as regards the enjoyment of their rights and the performance of their duties.

The equality of states, said Sumner in the United States Senate on March 23, 1871, is a principle of international law, just as the equality of citizens is an axiom of our declaration of independence. One cannot do to a small and weak people what could not be done to a great and powerful people or what we would not suffer to be done to us.

**395.** The natural difference between the white and colored races cannot serve to establish a substantial difference in the legal condition of these races from the point of view of international law.

Nevertheless, complete legal equality must be, in fact, considered as limited to the states which admit the fundamental legal ideas that are indispensable to the establishment of the legal community among states.

The principle of the legal equality of all the independent states which are members of the international society must on the whole be admitted without question. Yet, in order that such equality may be realized, it is indispensable that states have a uniform conception of the principles which must govern their reciprocal relations. Now, such uniformity in the legal community can be considered as actually effective only among the states of Europe, among those states and certain states of America, and among only a few states of Asia and Africa. With respect to the former, Japan, now considered a great Power, must be noted, while Persia, China, Siam, Thibet and Afghanistan are considered in some respects only as belonging to the great family. In Africa, the Republic of Liberia is regarded as a member of the great family of states.

Compare Oppenheim, *Op. cit.*, pp. 162-164.

**396.** Every act of jurisdiction of the Great Powers with regard to smaller states, or their claim of any right to settle the difficulties

in which these states are concerned, without granting them the privilege of being represented or of asserting their rights, must be considered as contrary to the legal equality of states.

No free and sovereign people can be compelled to recognize a more powerful state as their superior. After the Congress of Aix-la-Chapelle of 1818, the five Great Powers of Europe, Austria, France, Great Britain, Prussia and Russia constituted themselves a permanent council to settle European affairs by common accord. The development of sounder legal views and the progress of civilization have broken down the power of that pentarchy and have increased the number of the Great Powers by admitting Italy, the United States of North America and still more recently, Japan. The result has been that, although the Great Powers have not renounced the exercise of their right of hegemony in questions of actual general interest, yet, whenever in the settlement of affairs of importance some one or other of the minor powers have been involved, the latter have been asked to submit their views to the Great Powers without, however, being permitted to cast a vote.

From the view-point of law, there are neither great nor small states. Victor Hugo wrote with reason: "The greatness of a people is no more measured by their number than the greatness of a man is measured by his stature." Letter of Victor Hugo to Pastor Bost de Genève, Nov. 7, 1862. Cf. Nys, *Le droit international*, II, p. 194, and the authorities there cited.

#### INEQUALITY IN FACT

**397.** Legal equality between states cannot imply equality in fact. The natural development of each state and the increase in power resulting from the constant progress of intellectual and moral forces and the resulting inequalities in fact must be respected as the natural effects of legal liberty.

**398.** The effective enjoyment of rights, which presuppose certain conditions of fact, may be refused to states which do not at the present time meet the factual requirements.

One can understand, for instance, that the right to hoist a flag can only belong to states which have seacoasts. Therefore, Switzerland was wrong in assuming the right to fly the federal maritime flag on the high seas.

**399.** A state which, by reason of traditional prejudices, of its internal organization or its customs and religious creed, is not competent to fulfill its international duties towards other states, cannot request the full enjoyment of international rights on a footing of complete equality; that would require a modification of its internal organization so as to offer effective guaranties for the fulfillment of its duties towards other states.

**400.** Yet, states which entertain *de facto* relations with another

state whose legal equality cannot be recognized, ought always to comply with the rules and stipulations of conventions. As for the rules of "common" international law, they ought to observe those which, considering the social conditions of the uncivilized state, must be deemed necessary for the safeguard of public and private rights.

#### RESPECT OF MORAL PERSONALITY AND HONOR

**401.** All states, great and small, empires, kingdoms, republics, principalities, or duchies, are equally entitled to the respect of their personality and moral dignity. Each has the right to require due satisfaction in case its personality or dignity be violated.

**402.** The honors due to a state and to the sovereign who represents it, in view of his title and international position, must be regulated in accordance with international ceremonial and applicable agreements.

**403.** No rule of international ceremonial, whether resulting from custom or treaties, can be observed if it is offensive to the moral dignity of a state.

**404.** Every state has the right to assume the title which corresponds to its importance and international position. The highest title cannot, however, entitle a state to a superior legal position, but only to the right to such honors as are recognized by international usage or by treaties.

In the event of a change in the original title of a state, the recognition of other governments must be deemed necessary in order that the new title may be admitted in international relations.

**405.** Every sovereign in his diplomatic relations with other sovereigns has the right to use his title and to require that it be used by others.

As regards correspondence, the forms established by diplomatic usage must be observed.

**406.** It cannot be considered as contrary to the dignity of states to agree by common consent to make use, in diplomatic correspondence, of the French language, which is universally known. On the contrary, the attempt of a government to impose the use of its language on one or more countries in diplomatic acts, would be derogatory to that dignity.

## PRECEDENCE AND RANK

**407.** No state can claim a right of precedence over other states, so as thus to establish its legal superiority. All questions relating to precedence and rank must be regulated in conformity with diplomatic ceremonial and usage. These questions must be considered from the point of view of the *comitas gentium*.

Controversies relating to precedence and rank were agitated at great length as late as the 18th century. History abounds with examples of ardent controversies and conflicts due to claims to precedence on the part of certain states. In the 16th century, one of the most spirited disputes arose among the diplomatic representatives assembled at the Council of Trent. In the 17th century, a celebrated dispute arose at London between the Comte d'Estrade, the French Ambassador and Baron de Divatteville, the Spanish Ambassador. Again, in the 18th century, a notorious dispute took place between the British Ambassador, Lord Kimoul and the French Ambassador, Comte de Merle. The efforts made at the Congress of Aix-la-Chapelle to settle such controversies failed owing to the vanity and customs of Courts. In the 19th century, an unsuccessful attempt was made at the Congress of Vienna (1815) to determine the rank of states. Regulations, however, were adopted to determine the rank of diplomatic agents (March 19, 1815). For the order of precedence at the time of the signing of the final act of the Congress of Vienna, it was agreed to adopt the alphabetical order according to the initial letter of the name of each state.

## RULES OF DIPLOMATIC USAGE

**408.** All the states whose sovereign has the title of king are to be considered of royal rank. They are on an equality with those having imperial rank. These two classes of states have the right to send and receive ambassadors, to make use of royal emblems, crowns, scepters and coats of arms. For the subscription of treaties, precedence among them is fixed by alphabetical order. With respect to their representatives, rank and precedence are to be fixed according to the date of the presentation of their credentials.

**409.** Republics which have royal rank must be considered in the same position as monarchies and other sovereign states and subject to the same rules of diplomatic ceremonial,—these rules in their application being considered independent of the constitutional differences in states.

**410.** States not of royal rank must be considered, from the point of view of precedence, as inferior to monarchies and any other states of royal rank.

**411.** Semi-sovereign or dependent states, by reason of vassalage, protectorate or feudal relations, must admit the precedence both of the states under whose dependency they come and of other sovereign states.

A relation of dependency naturally determines the inferiority of semi-sovereign or protected states. Therefore, the principality of Bulgaria had to submit to the precedence of Turkey; the same is true of the German princes with respect to the Emperor.

At the Peace Conference of The Hague in 1899, all the states represented signed according to alphabetical order. Bulgaria as a vassal state of Turkey, signed after all the other powers.

**412.** The Pope, as head of the Catholic Church, may enjoy precedence in his relations with other monarchs and princes of Catholic states, but not in his relations with Russia and Protestant states.

The Pope, although he may enjoy sovereign honors under article 3 of the Italian law of May 13, 1871, in regard to the prerogatives of the Sovereign Pontiff and the Holy See, is not in the same position as when he was King of the Pontifical States. Since he had lost political sovereignty, he could no longer invoke the application of the rules of precedence applicable between the sovereigns of states. Article 3 of the aforesaid law, it may be observed, reads as follows: "The Italian government pays to the Sovereign Pontiff on the territory of the kingdom the sovereign honors and upholds the honorary precedences accorded him by Catholic sovereigns." It is not possible to claim under this article that when the Pope wishes to take part in a congress as head of the Catholic Church, he can avail himself of the right of precedence established in his favor when he had the dual character of sovereign of the Pontifical State and head of the Catholic Church, since Italy undoubtedly could not by its internal legislation bind other states.

At any rate, it is quite evident in our opinion that if the Pope should participate in an international meeting of political sovereigns, the rules which determine precedence among states could not be applied. Undoubtedly, the Pope cannot be considered as a political sovereign. It must indeed be admitted that he occupies a quite exceptional position. The respect due the head of the Church by reason of the high authority he possesses might even lead Protestant states to grant him the precedence he has always enjoyed, not as king of the small state which the Papal States used to be, but as Sovereign Pontiff. In this way, placing him outside the relations established between political sovereigns, his true position of precedence would be determined by the honorary sovereignty which is granted to him.

#### MARITIME CEREMONIAL

**413.** Every state has the right to fix the rules of maritime ceremonial which national vessels must observe toward one another and toward foreign vessels; but they cannot require the reciprocal



adoption of these rules by other states unless there is an express convention.

**414.** Every state can declare the observance of the maritime ceremonial thus established obligatory upon ships which cross its territorial waters or enter its ports.

**415.** A sovereign can never legitimately impose on foreign vessels entering his territorial waters, a form of salute which, from a general standpoint, may be regarded as humiliating. Such would be the case of a salute rendered by lowering the flag or of any other form of salute which might imply an act of subjection. Such also would be a salute by salvos of artillery, when there is no obligation to return them.

**416.** The rules governing the salute of ships meeting on the high seas and all maritime ceremonial should be established by common accord; in the absence of such rules, those based on customary law and on the *comitas gentium* should be observed.

**417.** When the rules of ceremonial to be reciprocally observed are established by treaty, their non-observance may justify a protest and give a right to demand explanations.

**418.** Non-observance of the ceremonial adopted by common accord is not sufficient in itself, however, to give rise to the presumption of an intention to offend the foreign state, unless well-established precedents and well-defined circumstances lead to a contrary conclusion.

**419.** In the absence of an agreement relating to the salute of vessels meeting on the high seas, the rules sanctioned by usage must be observed. These rules are as follows:

Merchant vessels meeting on the high seas are not obliged to salute.

War vessels must salute. The ship of lower rank must salute first. When the ships are of equal rank, the one to salute first, is the one sailing leeward.

A war vessel must salute first when nearing a fortress or a port or when leaving it, when meeting a squadron, when meeting a ship having on board a sovereign or member of a royal family or an ambassador.

An auxiliary squadron must salute a main squadron first.

**420.** A salute given by salvos of artillery must be returned gun for gun; but a vessel of superior rank, which responds to the salute

of one of inferior rank, may fire one gun less. This practice, however, could not be impelled by the consideration of superiority in maritime power of the state to which a ship of equal rank belongs.

421. During solemnities, court functions and national mourning, foreign war vessels should observe the rules established by the regulations of the state to which the port belongs. Commanders of vessels who believe that they ought not or cannot conform to them should leave the port.

#### POLITICAL EQUILIBRIUM

422. The equilibrium of forces and material power of states cannot be deemed necessary to assure the protection of their rights and their security.

Nevertheless, the legal equilibrium whose purpose must be to insure in the relations of states the preponderance and sovereign empire of law, should be considered as indispensable.

The conception of political equilibrium was understood by the older thinkers as the proportional distribution of the material forces of states to safeguard their security and their reciprocal rights. This conception was brought about by the Abbé de Saint-Pierre in his *Projet de traité pour rendre la paix perpétuelle*, and was considered as one of the requirements to assuring peace and preventing a state, by reason of the increase of its territorial possessions, from dictating its laws to all the other powers. Article 2 of the Treaty of Utrecht of July 13, 1713, contains the expression of *Justum potentia equilibrium*. Fénélon (*Oeuvres*, v. III, p. 361, edition of 1835) demonstrated the necessity of checking the increasing power of the House of Austria under Charles the Fifth, and from that time up to the present day the policy of statesmen has constantly been to maintain the so-called balance of power and to work towards its restoration when disturbed by the growth of territorial possessions and conquests. At the Congress of Vienna, the repartition of territorial possessions was justified by the idea of maintaining the equilibrium. The dismemberment of Poland has been justified on the same grounds.

In like manner, the annexation of Nice and Savoy was claimed by reason of the necessity of restoring the equilibrium which was broken by the formation and extension of the Kingdom of Italy. The preservation of Turkey has likewise been held indispensable for the so-called balance of power, which most certainly would be disturbed if the territorial possessions of the Porte in Europe were to be apportioned among those who covet them. For these reasons, the statesmen of the Great Powers have agreed to maintain an order of things which surely could not be justified. Impelled by the fear of the unavoidable upsetting of the balance of power, and of the difficulty of restoring it, they have preferred to maintain a state of affairs which certainly does not reflect credit either on Christianity or civilization. When the time came, the great Powers

were powerless to prevent the acts which have materially changed the position of Turkey.

Useful information is to be found in the article by Nys, *La théorie de l'équilibre européen*, *Revue de Droit international*, v. XVI, 1893, and in the work by Stieglitz, *De l'équilibre politique, du légitimisme et du principe des nationalités* (in Russian) 1889-1892, French translation, 1893.

**423.** The freedom which every state possesses to provide for the increase of its powers, cannot be limited by reason of the so-called balance of power, if such increase does not interfere with the right of other states and does not violate the rules of international law.

It is the privilege of the states which consider themselves menaced by the constant increase of power of another state, to provide for their security and safety and to conclude alliances with one another so as to unite their forces to resist the attacks of the growing power.

**424.** It must always be considered necessary for the orderly existence of states in the international society, to determine by legal rules the just limit of action of each of them and to assure legal protection for the rules.

**425.** Every state which, by misuse of its power, would assure its supremacy in disregard of the rights of other states, or would extend its territorial possessions in violation of international law, would justify resistance on the part of other states, which might with reason consider such an attempt to secure supremacy as a menace to their independence and as derogatory to the legal equilibrium which is indispensable to the existence of international society.

A certain equilibrium must be considered indispensable to assure the existence of international society. We believe, however, that such an equilibrium will be realized only when, in that society, the preponderance of right is substituted for that of force. With a view to justifying certain pretensions to territorial aggrandizement, diplomacy sought to have them considered as essential for the maintenance of the equilibrium, and so in various cases the necessity of compensation among states was advocated. Thus, in the 18th century, they tried to justify the partition of Poland by this theory of compensation, which was also sanctioned in 1878 at the Congress of Berlin, in order to recognize the privileged position of Austria with respect to Bosnia and Herzegovina. While we believe that a certain equilibrium is indispensable for insuring the rational organization of international society, we cannot, however, admit that it may consist in the equalization of material forces or in their artificial distribution. Equilibrium cannot proceed from artificial measures; it can become effective only when law becomes preponderant in international society and when its legal protection is effectively assured. We can-

not conceive the realization of political equilibrium in international society until Mirabeau's prophecy comes true: *le droit soit le souverain du monde*.

**426.** It is the duty of states, in order to insure the existence of general peace, to fix by common agreement the limit of armaments, so as to prevent the unjustifiable increase of the military forces of any one of them from compelling the others to perfect their military establishment and so cause an economic and moral disturbance in all countries.

## TITLE XIV

### REPRESENTATION OF STATES

#### TO WHOM SHOULD REPRESENTATION BE ASSIGNED

**427.** The representation of a state in its relations with other states should be assigned to the person or persons to whom its constitution actually entrusts the exercise of governmental power. These are:

- a. The sovereign or head of the state;
- b. The persons who, by constitutional law, exercise at the time the powers of sovereignty;
- c. Diplomatic agents.

#### THE SOVEREIGN AND HIS FAMILY

**428.** The person who reigns and governs as sovereign is in full right the legal representative of the state and may, as such, exercise in international relations the public power which is entrusted to him by the constitution.

There is no difference in this respect whether the head of state be king, emperor, president or prince.

**429.** The right of representation must be granted in like manner to any person who in fact is in effective possession of the sovereign power. As such, he may exercise all the rights attaching to this power, with respect to the states which have recognized the actual order of things and entered into relations with the new government.

**430.** He who in fact loses the exercise of sovereign power ceases to represent the state in his acts, until he has recovered the free exercise of sovereignty.

History affords us several instances of sovereigns deprived of their supreme authority. Even when this is temporary, expediency may guide rulers to decide whether or not they should continue to bestow on the fallen sovereign the titles and honors which were previously accorded him; but as regards the legit-

imate representation of the state in its international relations, they cannot admit that this sovereign may represent the state, when as a matter of fact he is deprived of public power and of his legal position as head of the government. In international relations, the head of a state is he *qui de facto regit*: it is he, therefore, who must be considered the legal representative of the state with respect to other governments which intend to maintain international relations with it or wish to renew such relations after their temporary interruption.

**431.** In all his acts as representative of the state, the ruler must be deemed invested with sovereignty and subject as such to international law.

**432.** The persons who belong to the family of the sovereign cannot share in the enjoyment of the rights which are assigned to him as representative of the state. They must, however, be considered under the protection of international law and enjoy the rights and prerogatives which, according to custom and international usage, belong to the members of reigning sovereign families.

#### MINISTER OF FOREIGN AFFAIRS

**433.** In the exercise of his functions and duties under the law of the state, the minister of foreign affairs represents the state in his acts.

He is considered as invested with his powers as such, from the day he sends notice of his appointment to the members of the diplomatic corps accredited to the head of the state, and to the diplomatic agents and consuls of his own country accredited to foreign governments.

**434.** The duties of the minister of foreign affairs are determined by the law of each state.

He must be considered in principle as authorized to maintain relations with the representatives of foreign states, and in the name of his government to issue communications and declarations to the said representatives; to negotiate with them treaties of alliance and to appoint the persons delegated especially to negotiate treaties of commerce and extradition, etc.; to prepare the instructions issued to these persons; to provide for the protection of citizens abroad and to safeguard abroad the interests of citizens and of the state; and to perform, in general, all acts which under the law of the state or diplomatic usage, must be performed by the minister of foreign affairs.

## DIPLOMATIC AGENTS

**435.** Persons who are assigned the mission of maintaining diplomatic relations between the state they represent and the one to which they are officially accredited are diplomatic agents. They may be either ambassadors ordinary or extraordinary, public ministers, envoys extraordinary or persons entrusted with special missions.

The category of persons chosen to represent the state in international relations must serve to determine their hierarchical position, as well as their rights and prerogatives by reason of official hierarchy. The category of public ministers comprises a first and a second class: (1) resident ministers and (2) ministers extraordinary or temporary envoys sent on special missions. The difference in their position, as regards the object of their appointment and their hierarchical rank, may have the effect of assigning to them certain rights and prerogatives under the diplomatic ceremonial and to fix their position as members of the diplomatic corps; but it does not affect their legal status, in so far as in their acts they represent the state.

In the class of envoys extraordinary may be put all persons who have the temporary mission of representing the state. Thus, commissioners charged with representing their government to negotiate certain special matters, and also consuls invested temporarily with a diplomatic mission may be included in this class.

**436.** It is the duty of the sovereign of every state to determine the class and rank of the diplomatic agent accredited by him to a foreign sovereign.

Whatever may be the hierarchical position of the accredited person, he must be considered as the legal representative of the state as regards acts performed by him by virtue of his commission. This arises from the fact that the sovereign commissioned him to represent the state officially.

Under the regulations drawn up at Vienna, March 19, 1815, and completed later at Aix-la-Chapelle, November 21, 1818, diplomatic agents were divided into four classes. The first class comprised ambassadors and legates *a* or *de latere*, envoys extraordinary of the Pope. The second class was composed of ministers plenipotentiary, envoys extraordinary and internuncios of the Pope. Ministers resident formed the third class. Chargés d'affaires constituted the fourth class. However, this classification seems to us of no importance so far as the representation of the state is concerned. In effect, representation depends only on commission and mandate, not on rank, which is important only for the determination of hierarchy and diplomatic ceremonial. Therefore, the representative character which is attributed to agents of the first class, must be understood as meaning that ambassadors, by virtue of the high dignity with which they are invested, can represent the sovereign personally and consequently enjoy certain special prerogatives.

Compare rule 462.

I  
HOW THE CHARACTER OF REPRESENTATIVE OF THE STATE IS ESTABLISHED

**437.** The public character of representative of the state is established by the appointment of one or more persons as such, by the sovereign of the state who sends them, and through the official notification made to the government to which the agent is accredited, which notification is expressly or tacitly accepted by such government.

WHO HAS THE RIGHT TO SEND DIPLOMATIC AGENTS

**438.** The right to be represented by diplomatic agents is possessed by every independent state which, as a person in the international society, actually maintains relations with other states.

This right can equally be attributed to legal entities qualified as such and to associations whose international personality is recognized.

Compare rules 81-82.

Under these rules, it must be admitted that, should several independent states be united in a "union" established for a well-defined purpose, and should the international personality of this "union" be recognized, there could be an international representation of the states thus limited within the scope of their union. The North Germanic Confederation, founded in 1867, is an example of this sort of union and representation. A federative empire which had not the unitary form (such as the German Empire in 1871), and allowed the personality of the confederated states to subsist, could also be entitled to a dual representation corresponding to its dual personality.

**439.** The right to maintain international relations through diplomatic agents may be accorded a government arising out of a revolution or civil war, whenever it is found to be in effective possession of public power and sovereign functions and has been recognized by foreign governments.

While it must be left to the judgment of every government whether or not it should enter into diplomatic relations with a government which was constituted as a result of a revolution or civil war, political wisdom must impel it not to receive diplomatic agents until the new government is not only in *de facto* possession of the rights of sovereignty, but also presents the stability required in order that it may be considered capable of assuming the responsibility both for its own acts and those of the people it governs.

**440.** It is the privilege of the government of every state to decide with absolute freedom whether it should establish diplo-



matic relations with the government of a state newly constituted or continue relations with the dispossessed sovereign.

In principle, we cannot consider diplomatic relations with the government of a new state to be established in good faith until that state presents sufficient guaranties of stability and the former sovereign is no longer possessed of sufficient means to restore his authority.

**441.** The sovereign who is considered as effectively ousted, cannot assume the right to maintain relations with other states through diplomatic agents appointed by him, nor to confer on these agents the right to represent the state.

**442.** The title of diplomatic agents cannot be applied to commissioners or agents sent by a revolutionary party during a civil war to deliver communications to foreign governments.

The right of legation can be granted only to the one *qui de facto regit*.

#### ACCEPTANCE OF THE DIPLOMATIC AGENT APPOINTED

**443.** A state which has consented to establish or to continue to maintain diplomatic relations with another state cannot in principle refuse to accept the diplomatic agent appointed.

**444.** It must be considered in conformity with sound international custom to accredit as a diplomatic agent only a *persona grata*.

The previous consent of the person invested with the character of diplomatic agent cannot be considered as necessary to determine his status. Nevertheless, a government may refuse to receive as a diplomatic agent a person who is a citizen of the state, or who, for serious reasons may be considered as unfit to maintain good relations between the two governments.

In principle, it must be admitted that the appointment of a diplomatic agent is an act of sovereignty, and that it cannot be subordinated to the condition of previous consent.

But since the purpose of permanent legations is to maintain good relations between the two governments and since this cannot be done by persons who are not acceptable and who do not inspire full confidence, the more general practice is for any government, before appointing the person whom it wishes to accredit to another, to sound the latter on the matter and obtain its consent. This is what, in diplomatic language, is called *agrégation*. It cannot, however, be considered as indispensable and a previous condition to the exercise of the right of legation. It is to be noted, however, that as reciprocal consent must

always be deemed requisite for creating and maintaining legations, a government, even after its previous agreement, may revoke its consent and refuse to receive or to keep an envoy on particular grounds. If, on the other hand, such refusal were arbitrary, obstinate and unjustified, it is obvious that good diplomatic relations might be impaired and even interrupted.

**445.** The sending without previous consent of a diplomatic agent may be considered as an unfriendly act, but the well-founded refusal to receive or retain a given person as diplomatic agent cannot be so considered.

**446.** The refusal to receive an accredited diplomatic agent must be considered as effectively depriving him of his public character not only with respect to the state to which he is accredited but to third states as well.

An unreasonable refusal may justify the breaking off of ordinary diplomatic relations as the government may have good reasons for not appointing another person to represent it.

These rules are based on the idea that the sending of a diplomatic agent is an act of sovereignty, and must be, consequently, exercised with the fullest independence. It is only according to the *comitas gentium*, that the maintenance of diplomatic relations presupposes the express or tacit consent of the state to which the diplomatic agent is sent. Consequently, in the absence of such previous general or special consent, the government may always refuse to receive a diplomatic envoy charged with a special mission, or refuse on good grounds to continue to negotiate with the diplomatic agent already accredited.

#### POWERS OF A DIPLOMATIC AGENT

**447.** The powers of a diplomatic agent as representative of the state which has accredited him are those specified in his credentials, indicating the object and scope of his mission. These powers can be better fixed and specified in the official notes addressed and communicated to the foreign sovereign.

**448.** The instructions given a diplomatic agent in his credentials, and specified and determined by means of notes communicated in diplomatic form to the foreign sovereign and government, cannot be considered as modified by secret instructions given by a government to its diplomatic agent, but not communicated officially to the foreign government.

**449.** The formalities to be observed in the presentation of credentials and the communication of notes and official acts are determined by the ceremonial and rules of diplomatic intercourse.

**450.** The diplomatic agent, in all acts performed within the

scope of his instructions, as they appear from his credentials and the notes officially communicated, legally represents the state which has accredited him. Therefore, the obligations which he contracts by virtue of his instructions, must be considered as contracted in the name of the state he represents, subject always, for their effectiveness, to the obligation of ratification by the sovereign or the person who has that power under the constitution.

#### RESPONSIBILITY OF THE DIPLOMATIC AGENT

**451.** The diplomatic agent is not personally responsible toward the other state or states for what he does as representative of the state. The government which accredited him is responsible for such acts. This responsibility must be determined and fixed in accordance with the rules of international law applicable to the responsibility of states in their reciprocal relations.

**452.** In all matters relating to the fulfillment of his mission, the diplomatic agent is entitled to personal inviolability, in peace as well as in war. When war has been declared, however, he can enjoy inviolability only during the time necessary for him to leave his residence and return to his own country or proceed elsewhere.

#### RIGHTS AND PRIVILEGES OF DIPLOMATIC AGENTS

**453.** A diplomatic agent has the right to be allowed to fulfill the high mission with which he is entrusted with complete freedom and independence. He may, therefore, demand the enjoyment of the rights and privileges which are considered as appropriate by international custom. Such privileges are:

- a. Exemption from inspection of his baggage and of any package addressed to him when sealed with the seal of his government;
- b. Immunity from customs duties;
- c. The exercise of his own religion and consequently, the right to have a chapel and a minister with the personnel necessary to celebrate divine service;
- d. Exemption from personal taxes and forced loans.

**454.** A diplomatic agent may also demand the enjoyment of the immunities and privileges established by usage or conventions or reciprocity.

Such are:

- a. Exemption from war taxes, the obligation of billeting, etc.;
- b. Exemption from charges imposed on resident foreigners.

Publicists admit that the privileges and immunities which the diplomatic agent may enjoy, cannot be determined according to uniform and absolute rules. Some of them are founded on international customary law. Others are based on the *comitas gentium* and must be governed either by conventions, usage or reciprocity. Exemption from taxes and immunity from customs certainly have no legal basis. It can even strictly be held that since the diplomatic agent must pay the taxes on consumable goods, he must pay the taxes on goods brought into the country to satisfy his personal needs. Compare: Heffter, *Droit international*, § 217; Pradier-Fodéré, *Cours de droit diplomatique*, v. 2, p. 45; Calvo, *Droit international*, §§ 1529 *et seq.*; Bluntschli, *Droit international codifié*, rules 222-223; Oppenheim, *International law*, v. I, 2d ed., pp. 460-472.

**455.** It is incumbent upon the diplomatic agent to make use of his privileges with dignity and in good faith and not to avail himself of the immunities that are granted to him either to favor third parties or to procure for himself certain commercial advantages.

**456.** Customs officers cannot be prohibited from examining, with the proper respect due a foreign minister, packages and goods addressed to the diplomatic agent not under the seal of his government. By the *comitas gentium*, however, it is considered obligatory not to subject to inspection the packages of a diplomatic agent who has declared that they do not contain any goods prohibited or intended for commercial purposes.

**457.** The diplomatic agent may demand the honors and exemptions which, under the usage of ceremonial and "common" law are due him in accordance with his rank, mission and hierarchical position.

**458.** The diplomatic agent who has a permanent mission, may hoist over his official residence the flag of the state he represents and affix thereon the arms of his state, or an inscription designed to indicate that this place is the seat of the legation.

**459.** Diplomatic agents have the right to exercise with respect to their countrymen all the functions assigned to them under the law of the state they represent. Their acts of this character must be held valid even in the state where the legation is established, except for express reservations duly stipulated by the government.

This rule is based on the idea that when a state agrees that another state may establish a legation, it agrees implicitly by that very fact that diplomatic

agents may exercise with respect to their countrymen all the privileges which are conferred on them under the law of the country they represent. This has special reference to the authentication of documents, the drawing up of wills and certain acts affecting the civil status, such as the celebration of marriage between citizens. Nevertheless, the government to which the diplomatic agent is accredited may, if it sees fit, make reservations as to the validity on its territory of acts affecting the civil status performed by said agent.

#### PREROGATIVES OF DIPLOMATIC AGENTS

**460.** Whenever the rules of "common" law are applied to any matter concerning the diplomatic agent in his private relations, having no connection with the exercise of his functions, he has the right to expect that his high position and his character as representative of a foreign state will be taken into account.

**461.** A diplomatic agent cannot be subject to personal arrest for debts, as a private person would. He is not obliged to appear personally in court to be examined, to make a deposition, or to perform acts required by the code of procedure. He may demand that an examining magistrate proceed to his residence for the performance of the said acts, giving him proper notice in advance.

**462.** A diplomatic agent may claim the enjoyment of all the honorary prerogatives generally admitted by ceremonial and international usage, taking into account his rank and class.

These prerogatives, for ambassadors and ministers of the first class, are:

- a. The right to the title of Excellency on the part of those who treat with them either by correspondence or personally, provided it is sanctioned by the ceremonial of the court of the sovereign to which the diplomats are accredited;
- b. The right to have a throne in their reception room;
- c. The right to remain covered during their presentation ceremony when the sovereign to whom they are accredited himself remains covered;
- d. The right to receive military honors when they officially attend public ceremonies.

It is because of these honorary prerogatives that it is commonly said that only ambassadors represent the sovereign who has accredited them.

Since diplomatic agents of the second and third classes do not represent the person of the sovereign, they cannot enjoy the honors reserved to the sovereign. Consequently, they have no direct access to the head of the state, whose audience they must request through the Minister of Foreign Affairs.

All these matters relate to diplomatic ceremonial and etiquette.  
Compare rules 401, 406, 407.

#### INVIOABILITY OF CORRESPONDENCE

**463.** The correspondence of a diplomatic agent with his government must be considered inviolate, whether it be carried on by ordinary means or by special couriers.

The responsibility of the state for violation of correspondence cannot be considered as having ceased directly after diplomatic relations between the two governments have been broken. It must, on the contrary, continue during that reasonable time which must always be given the diplomatic agent to leave his post.

**464.** The molestation of the official correspondence of diplomatic agents is on a parity with the violation of extraterritoriality, the enjoyment of which they are entitled to in the exercise of their functions as representatives of their sovereign. The government which infringes such exemption, therefore, must be held responsible under international law for the grave offense involved in a violation of state secrets.

#### IMMUNITIES OF DIPLOMATIC AGENTS AND VIOLATIONS THEREOF

**465.** Diplomatic agents must be held completely and absolutely immune so far as concerns their personal responsibility in the performance of their functions as representatives of a foreign state.

Even when the case demands that they be subject to the application of the rules of "common" law for their private acts, it is always necessary to safeguard the prestige and the respect due to their dignity. This must be considered indispensable for the protection of the reciprocal interests of states and for the readier maintenance of their diplomatic relations.

We do not admit, in principle, the absolute immunity of diplomatic agents, as it is recognized by time-honored theory (compare rules 334 *et seq.* and 346). Nevertheless, it should be recognized that diplomatic agents, as representatives of foreign sovereigns, must be protected in their high mission and freedom of action; otherwise, international relations of which they are the mediums, would become impossible. It is, therefore, evident that the rules, which in certain cases justify their submission to the ordinary courts, must normally cease of application by reason of the necessities of the case and the require-

ments looking to the friendly relations of the several states. Consequently any question which concerns diplomatic agents must be examined with extreme moderation, taking into account their high mission and the principles both of the law of nations and of the political policy of each country. Even when diplomatic agents abuse their position it must be considered preferable to have them recalled by their government rather than jeopardize friendly relations with the state they represent.

466. Any offense offered to the representative of a foreign state as such, involves the direct or indirect responsibility of the government and must be deemed a violation of the "common" law of the international society.

467. We must admit the direct responsibility of the government for any offense against a foreign diplomatic agent offered by an official intrusted with the maintenance of diplomatic relations, provided the head of the government has not frankly disavowed the acts of its official and made proper amends.

468. The indirect responsibility of the government must be admitted in case of an offense against a diplomatic agent by a minor official of the state, when the government, having had notice of the act, has failed to make proper reparation.

Such responsibility must also be admitted in case of an offense on the part of private individuals, when the government has not taken the necessary steps to discover the authors and punish them; or when it has failed to take all necessary measures to prevent the offense, when this was possible.

469. The responsibility of the state should always be diminished when the injury to the diplomatic agent has resulted from his own imprudence, and it should be still less when he has virtually provoked it.

470. If, by reason of the very nature of the acts or of circumstances, the offense directed against the foreign minister by individuals is presumably unconnected with his office, it cannot give rise to diplomatic complaints, except to obtain proper explanations.

The offense may, however, constitute a crime on the part of the offenders under municipal law, when they knew the character of the person injured, or when they could not have been ignorant of it.

The laws of different states provide in various ways for the punishment of offenses against foreign ministers. Great Britain has a special law on the matter, "*an act for preserving the privileges of ambassadors and other public ministers of foreign princes and states*" (Statute of 7 Anne, chap. XII.) In Italy, such offenses are punished by article 130 of the Criminal Code; in

France, by the law of July 29, 1881, articles 37 and 47, and by the law of March 16, 1893. In Germany, there is a relevant provision in article 104 of the criminal code; in Austria, in article 494; in Holland, in articles 118 and 119; in Portugal, in article 159; in Russia, in article 261; finally, in Belgium, in articles 6 and 7 of the law of March 12, 1858.

In some countries, the criminal code contains special provisions; in others, on the contrary, "common" law is applied with respect to the punishment of offenses against public officers. Pradier-Fodéré believes that, in the case of an offense against the ambassador of a foreign country, articles 84 and 85 of the French criminal code, which punish hostile acts that have exposed the state to a declaration of war, should be applied. (*Cours de droit diplomatique*, v. II, p. 13.)

See Fiore, words *Agenti diplomatici* in the *Digesto italiano*, no. 86 *et seq.*, where the laws of the different states are set forth.

#### PERSONS ATTACHED TO THE LEGATION

**471.** Persons attached to the legation, who exercise public functions under the law of their home state and who have been officially recognized as such by the government where the legation is established, should enjoy the rights and prerogatives of diplomatic agents in the exercise of such of their functions as are indispensable to the right of legation on the part of the state represented.

**472.** When the Minister of Foreign Affairs has received notice of their official position and privileges, officials temporarily attached to the legation should be considered as an integral part of the legation, and should enjoy, with respect to their functions, the rights and prerogatives which according to international law, persons acting in the name of the state must enjoy.

**473.** An official attached to the legation, who in case of the death or absence of the foreign diplomatic agent, is called upon to act in his place, has the character of a temporary diplomatic agent and should enjoy provisionally all the powers, rights and prerogatives of the titular diplomatic agent.

**474.** Persons composing the family of the minister do not enjoy any other rights and prerogatives beyond those which are due them in accordance with propriety and diplomatic ceremonial, in consideration of the high dignity with which the minister as head of the family is invested. These persons cannot enjoy the rights and prerogatives which, according to international law, belong to the representative of a foreign state.



Since all the rights and prerogatives which belong to foreign ministers under international law, are founded on the theory that they represent the state in their acts, and since the independence of states does not allow any state to exercise its jurisdiction according to "common" law over the acts of another, either directly or indirectly, it follows that the same right must be granted to persons attached to the legation when they perform acts or exercise public functions by delegation from the state they represent.

The wife of a foreign diplomatic agent cannot strictly share the rights and immunities which belong to the minister. Nevertheless, she has the right to share in the dignity of her husband and to participate in the respect which is due him, and it is clear that the independence which he enjoys and the exceptional respect to which he is always entitled, by reason of his high functions, must extend to his wife and family more than to other persons.

See, Martens, *Guide diplomatique*, v. I, p. 79.

**475.** Persons attached to the service of a foreign ambassador or minister cannot enjoy any immunity; they must remain subject to the usual jurisdictions, even with respect to acts committed by them in the performance of their duties.

Nevertheless, the local authorities must always act with reserve and prudence because of the respect due to the diplomatic agent and of the obligations of courtesy incumbent on the government to which he is accredited.

In every question concerning diplomatic agents and their suite, it is always necessary to differentiate between considerations based on the strict principles of international law and what political tact and prudence may suggest. It is easy to understand that, in order to maintain amicable relations with the government represented, it is necessary to act with a great deal of tact even when, for example, it involves the question of applying police regulations to the coachman of a foreign minister when they have been violated. Instead of following the principles of law, it is preferable for the government to which the minister is accredited to be guided by rules of courtesy.

Compare the decision of the French Court of Cassation of June 11, 1852, *Journal du Palais*, 1852, v. 2, p. 57.

See also the case of the coachman of the French ambassador at Berlin in 1888 in Calvo, *Dr. internat.*, v. 6, § 315, and the decision of the Alderman's Court of Berlin of December 18, 1888 (*Clunet*, *Journal*, 1889, p. 82).

#### RIGHTS OF DIPLOMATIC AGENTS WITH RESPECT TO THIRD POWERS

**476.** Diplomatic agents may avail themselves of their rights and prerogatives in the foreign countries they must traverse to reach the territory of the state to which they are sent, when they have established their character and have been authorized by the government of the third power to travel as foreign officials through its territory.

477. The public character of a diplomatic agent is considered as established with respect to a third state when the foreign minister has advised the government of that state of his character and has been advised that he may officially travel through its territory to reach his post.

478. Even in the absence of such previous authorization, when a diplomatic agent has by official documents shown his authority and his public character, he must be considered under the protection of international law and may require, even in a third state, the respect which is due him as the representative of his own state, and the enjoyment of the rights and privileges which according to "common" law may be deemed compatible with the safety of the state.

479. It is always incumbent on states that wish to maintain amicable international relations and not violate the principles of the *comitas gentium*, to treat with respect and consideration for their high functions, foreign diplomatic agents who travel through the country to reach their destination and have announced their position by means of official, trustworthy documents.

480. No government can obstruct the freedom of diplomatic relations and claim any justification, in the protection of its own interests, to disturb or render such relations difficult; it can only take all the measures which, according to the circumstances of the case, may be necessary to protect the safety of the state and to defend its interests.

Under this rule, it must be admitted that no government can hinder absolutely the free correspondence of diplomatic agents with their own government, nor make use of the monopoly of submarine cables to prevent or delay in time of war the free correspondence of foreign ministers with their sovereign, as happened in 1899 during the war between Great Britain and the South African Republic.

In like manner, it must be admitted that a government cannot absolutely forbid a diplomatic agent to travel through its territory to reach his destination or to return to his country. It can merely take the precautions justified by necessity for the protection of the interests of the state. Thus, for instance, it may deny a diplomatic agent the privilege of sojourn in its territory, or trace for him in advance an obligatory route.

#### DUTIES OF DIPLOMATIC AGENTS

481. It is incumbent on a diplomatic agent to protect scrupulously the interests of the state he represents; to carefully look to

the maintenance of good relations between the respective governments; to remove any cause which might disturb harmony between the two governments.

It is incumbent on him, also, to safeguard the interests of his fellow nationals and to defend them against any abuse of power on the part of the state to which he is accredited.

**482.** The diplomatic agent is bound to fulfill his mission with prudence and moderation. He must abstain from any direct interference with the local administrative or judicial authorities with a view to defending the interests of his countrymen; he must be content to take diplomatic action with proper reserve before the Minister of Foreign Affairs. He must scrupulously avoid every form of pressure, provocation and threat, and content himself with giving his assistance to the just claims of his fellow nationals, by facilitating them in pursuing the regular channels to obtain justice from the local authorities.

**483.** It devolves upon the diplomatic agent to respect the institutions and national customs of the country. He must abstain from every act calculated to give affront to the convictions of the people; he must also respect popular prejudices, of which the masses, less cultured, are especially jealous.

He must refrain from fomenting any conflict between political parties and abstain from any intrigue to approve or disapprove the acts of the government.

**484.** Any direct or indirect interference of diplomatic agents in the internal affairs of the state to which they are accredited must be considered as directly contrary to their mission, and may justify the government in preventing or repressing such an illegitimate interference.

The most frequent cases of interference of diplomatic agents in internal affairs are those of the envoys of the Pope, who by exercising a direct action on the clergy, have used their influence to uphold political parties. Thus, in 1895, Monsignor Agliardi, Papal Nuncio in Austria, interfered with the internal affairs of that country, criticising politics on certain points of interest to the Catholic religion, by means of speeches he addressed to the Catholics. In France, where the struggle between the parties is more accentuated, the Papal Nuncio, on several occasions, exercised his influence on the national clergy to sustain the political views of a particular party, at times encouraging the faithful to resist the laws promulgated by the government. This was done by Monsignor Ferrata, Papal Nuncio, in 1894 and more recently, by Monsignor Montagnini. The incident arising from the seizure of the documents of the latter was a consequence of the undue interference of the Pope's envoy. This is

not the place to discuss the matter. It would be necessary, in the first place, to decide whether the Pope's envoy to France was in the position of a diplomatic agent with all the prerogatives assigned to such agent under international law.

**485.** A diplomatic agent must not avail himself of the privilege of extritoriality which the legation enjoys, to make it available to conspirators who might wish to assemble with impunity in order to prepare or uphold a revolution or to organize an attack against the security of the state or the authority of the government. The non-observance of such duty would justify all the measures taken by the government to prevent an attack against the safety of the state, even by withdrawing the privilege of extritoriality from the legation building.

**486.** A diplomatic agent cannot shelter in his legation persons wanted by the police or local judicial authorities. He can only give protection to political offenders and refuse to turn them over to the proper local authorities.

**487.** A diplomatic envoy, in order to safeguard his independence and freedom of action toward the government to which he is accredited, cannot accept any honorary distinction nor any benefits from said government, without the authorization of his own government.

As a rule, a diplomatic agent cannot accept any decoration or present from the government to which he is accredited without the authorization of his own government.

#### OBSERVANCE OF CEREMONIAL

**488.** A diplomatic agent may require that the rules established by the practice of diplomacy, ceremonial and usage, be observed; he has, in case of non-observance, the right to demand and obtain an explanation, so as to preclude any unfriendly intention on the part of the government to which he is accredited.

**489.** The formalities to be observed at the time of the reception of diplomatic agents, of the presentation of their credentials, as regards visits and precedence are those established by the rules of diplomacy and court ceremonial.

## SUSPENSION OF THE POWERS OF A DIPLOMATIC AGENT

**490.** The powers of a diplomatic agent must be considered as temporarily suspended:

- a. In case of the death, deposition or abdication of the head of the state by whom the minister was accredited, so long as the latter has not been officially instructed by the successor to the throne to announce his accession.
- b. When, by reason of a revolution or any other cause, the political constitution either of the minister's home state or of that to which he is accredited, undergoes a change, so long as the respective governments have not, on the one hand, given official notice of the occurrence, or acknowledged it on the other.
- c. When, for personal reasons, the diplomatic agent finds himself in fact absolutely unable to fulfill his mission.
- d. When the diplomatic agent has officially resigned, so long as his resignation has not been accepted.

**491.** When the temporary suspension of the diplomatic mission takes place, the diplomatic agent does not lose *ipso facto* the character of representative of the state, nor the enjoyment of the rights and privileges which, according to international law, he possesses in that capacity.

## CESSATION OF THE DIPLOMATIC MISSION

**492.** The diplomatic mission ceases:

- a. When the agent was sent on a special mission which has terminated;
- b. When recalled by his government, the government to which he is accredited being notified of the recall;
- c. When the territorial sovereign has sent him his passport, fixing a time limit to leave the territory of the state;
- d. When he has sent in his resignation and its acceptance has been noted by the government to which he is accredited as well as accepted by his own;
- e. When war is declared between the two states.

**493.** In whatever manner the diplomatic mission may cease, not excluding the case of a declaration of war, it is always necessary

to grant the minister a reasonable time limit for returning to his country and to assure him of his privilege of personal inviolability and security until he crosses the frontier.

#### USURPATION OF DIPLOMATIC FUNCTIONS

**494.** Whoever assumes the character of representative of a state and exercises the functions of a diplomatic agent without being legally authorized thereunto, should be held guilty of violating international law and may be punished accordingly, not only in his own country, but also in the country in which he has usurped diplomatic functions.

## TITLE XV

### CONSULS

#### GENERAL CHARACTERISTICS OF CONSULS

495. Consuls have not in general the characteristics of diplomatic agents. Nevertheless, they must be regarded as public officers of the government which has appointed them; all of their acts must be considered as of a public character. In the exercise of their duties they may claim the enjoyment of the rights and privileges which are granted them according to international law.

496. Consuls may be considered as the representatives of the state in its political relations with the state to which they are sent only in cases where the exercise of diplomatic duties has been assigned to them with the formalities indicated for diplomatic agents. In that event, they are subject to the rules which govern diplomatic agents, by reason of the duties they exercise and within the limits of their appointment.

We believe that the substantial distinction between diplomatic agents and consuls must be maintained and that the former only should be given the power to represent the state. This cannot, however, prevent a government from assigning to its consul duties of a political nature, by instructing him to represent the state. We are of the opinion that in such case, it is indispensable that the special political powers assigned to the consul be determined and specified in the credentials which he must present to the foreign government.

There are numerous instances of diplomatic duties assigned to consuls general. Such duties are especially assigned by states of secondary importance, for example, by certain republics of South America, and by states which do not have full sovereignty, as Egypt.

497. Consuls *sensu stricto* are officials sent by a state to a city of another state there to exercise their public functions, *consules missi*. They are not allowed to engage in business.

The name of consul is also given to officials who, while not citizens of the state sending them but of the state to which they are accredited, have instructions to exercise consular duties in another country. They are called *consules electi* and constitute a class

inferior to the first, that of *consules missi*. They may engage in business.

The full enjoyment of the rights and privileges assigned to consuls under international law must, in principle, be considered as extended to *consules missi*.

#### ESTABLISHMENT OF CONSULATES

**498.** Consulates can be established only by virtue of a previous agreement of the two governments, either a consular or any other convention or agreement.

It is, however, considered contrary to good international relations arbitrarily to refuse the authorization for the establishment of a consulate at places where the commerce between the citizens of the two states has assumed considerable proportions.

**499.** When, in the convention between two states, the cities where consulates are to be established have been decided upon, the express consent of the two governments must be considered essential to the creation of a consulate at a place not indicated in the convention.

In principle, establishing consulates must be considered as within the sphere of the reciprocal freedom of states. But since, in places where commercial relations assume, in fact, a great development, the reciprocal interest of states that desire to continue good relations requires that the institutions capable of contributing to the development of commerce and the protection of public and private interests be promoted, the arbitrary refusal of the creation of consulates may with reason be considered as an unfriendly act so far as the maintenance of good relations between the two states is concerned. Such unjustified refusal might even be considered offensive by the state which desires to establish the consulate and has made a formal request to that effect.

**500.** When the two contracting states have reserved to themselves the reciprocal right to establish a consulate or vice-consulate in the cities, ports or places of their respective territories without indicating the location of such consulate, the right of one of the parties to prohibit the other from establishing a consulate in a certain place is always reserved.

This rule is based on the principle of independence and of the respect of the rights of territorial sovereignty. The general privilege to establish consulates in the respective territories does not imply the right to establish them against the will of the territorial state in any place within its jurisdiction. It can only be admitted that when a port is open to trade and consulates of different states are established there, the territorial sovereign cannot limit the right of the for-



sign sovereign under the general agreement by forbidding him to establish a consulate in that port. Indeed, a restriction that would not apply to other states would not be justifiable.

#### POWERS AND DUTIES OF CONSULS

**501.** The powers of consuls, in so far as they constitute their right as public officers to exercise duties as such, find their basis in the law of the state to which they belong. Every power, therefore, implies the right of the consul as a public officer under the law of the state which has appointed him.

His duties denote the exercise of the powers of the consul, under the rules established between the two states by a consular convention or treaty of commerce.

**502.** Aside from special rules established by common agreement between the two states, it must be admitted in principle that consuls have the right to protect the interests of their fellow-citizens, to lend assistance to their countrymen, and to see that the rules contained in treaties of commerce and navigation and in the agreements concluded between the two states are applied to their countrymen.

Moreover, they may exercise administrative functions with respect to their fellow-citizens, e. g., those of public registration officers and all other duties assigned to them with respect to the said citizens under the laws and regulations of their country. The acts thus performed by consuls have in the country which appointed them such legal value as the law of their state provides.

**503.** A consul cannot exercise any functions producing full legal effects in the country where he resides, except when the exercise of his powers under his national law may be considered as admitted by virtue of the conventions concluded between the two states.

To determine the powers of the consul of a state, we should first refer to his national law, to see whether or not he is competent to perform a specified act. His competence must be founded upon the law of his country as amplified by regulations. Thus, for instance, Italian consuls, under article 171 of the consular law may not only execute judicial commissions which are sent to them by the courts of Italy, but are also authorized to execute those sent them by foreign courts. Consequently, they have the power to undertake searches, make valuations, hear witnesses and receive depositions of Italian citizens established in or passing through their consular district. When, on the other hand, the question is to determine the exercise of his duties, with relation to

the country of his residence, it is indispensable to refer to the convention concluded between the two states. No function directly or indirectly implying a jurisdictional or imperative power can be exercised except under the consular convention. This, for example, is the case with respect to the right to affix seals and to institute guardianship, etc.

**504.** The powers of consuls must be considered as limited, not only when the limitations proceed expressly from the convention, but also when the exercise of such powers is inconsistent with the respect due to territorial law.

Even when, in the convention, the exercise of a power belonging to the respective consuls is not expressly reserved, the limitation may, nevertheless, arise from territorial law.

Let us suppose, for instance, that the territorial law stipulates that in all its civil effects, a marriage is valid only when celebrated before the territorial civil officer, and that the said law thus excludes the civil effects of a marriage celebrated by a consul, even though the intended husband and wife be fellow-citizens of the consul. In that case, the character of a civil officer conferred on the consul with respect to his fellow-citizens by the law of his country must be considered as limited, from the view-point of the territorial effect of acts under territorial law, from which it is not permitted to derogate.

#### WHEN IS THE CHARACTER OF CONSUL ESTABLISHED

**505.** A consul can only exercise his functions in the country where the consulate is established from the time the government of that country has officially recognized him.

**506.** The official recognition of the public character of a consul must be considered as effected through the observance of territorial laws and regulations relating to the official acceptance of foreign consuls.

Official relations between the local authorities and the consul are usually established as a result of the official communication made by the government which sends the consul and of his official acceptance as such by the territorial authorities, in conformity with local laws and regulations.

Under the laws of certain countries, a foreign consul is accepted through the official note which recognizes him as such and which is called *exequatur*. This is the case in France, Italy, Spain and the United States. In other countries, the official letter of acceptance is called *placet*. In still other states, like Russia and Germany, the consul is simply advised that his appointment has received the *exequatur*. In Austria, an official visé is affixed to the official letter of communication.

**507.** The *exequatur* can be withdrawn not only in cases determined by the convention, but also because of reasons personal to

the consul. In the latter case, however, the government which sent him has the right to demand and obtain explanations.

#### PROTECTION OF CITIZENS

**508.** Consuls must always be considered as authorized to protect the interests of absent or incompetent citizens of the state which sent them; they may do whatever may be required by circumstances to safeguard and protect the rights and interests of these citizens, observing, however, the provisions both of the territorial law and of the consular convention.

**509.** Even when not authorized by a convention to affix seals in case of the death of a citizen, consuls may nevertheless officially request the local authorities to provide for the protection and conservation of decedents' estates and rights of inheritance; they may be present or assist in all the proceedings of affixing and removing seals, drawing up the inventory and reports of the proceedings, and the prompt sale of perishable property of the estate. They may, for these purposes, request the local authorities to advise them of the date on which the various acts in the proceedings will be undertaken, and request that they be expedited. They may, moreover, require that the effects and securities inventoried be duly preserved, and supervise their preservation. They may demand that the funds realized from the sale of securities and property be deposited in public banks so as to earn interest, and they may prosecute the claims of deceased persons. In a word, they may do in the foreign country everything the interested parties are authorized to do under the law, provided they give their assent or are otherwise legally represented. When the interested nationals are present or legally represented, they may assist them to obtain the proper application of the law and of all the proceedings necessary for the preservation of their rights.

**510.** Consuls cannot, unless authorized by the consular convention, institute a guardianship or trusteeship in conformity with the law of their country; but they may always, in the interest of heirs, see to it that the guardianship is duly instituted and operates properly, referring the case if need be to the competent local authorities and assisting the interested parties before the courts.

**511.** The right of consuls to assist their nationals in all matters

not regulated by the consular convention, considering that it is based on the *comitas gentium*, cannot limit the power of the territorial authorities to apply the law of their country. Nevertheless, they must show the greatest courtesy to the consul who has asked assistance for his fellow-citizens.

#### DUTIES WITH REGARD TO THE MERCHANT MARINE

**512.** Consuls have the right to protect the merchant vessels of their country and to exercise over them a police jurisdiction consistent with proper respect for the local laws and the port regulations. To that end, they may receive the declarations of the captain, members of the crew and passengers with regard to events having occurred on board during the voyage, examine the ship's papers and exercise on board the ship all the powers conferred on them by their national law. They may, furthermore, require compliance with the local laws and regulations relating to the police of the port, the loading and unloading of vessels and the safe storage of merchandise.

**513.** Consuls may, without opposition from the local authorities, observe the provisions of their national law for settling minor difficulties which have occurred on board a national merchant vessel, provided their consequences do not extend beyond the ship. They may also settle disagreements between the captain and the crew by applying their national law and render assistance in all cases to the master of the ship when the local authorities are permitted by the local laws and regulations to interfere on board.

**514.** Consuls must be regarded as authorized to look after the property belonging to sailors of their country who may have died on board during the voyage or at the port of arrival. They may, therefore, proceed to inventory the effects and undertake other steps, except those requiring acts of sovereignty, for the preservation of the property of a decedent's estate, for which their right to apply to the proper territorial authorities must be recognized.

**515.** Consuls may, in the interest of their fellow-citizens, require the observance of the local laws, statutes and regulations relating to the police of ports, the loading and unloading of vessels and the safe storage of goods.

It devolves upon them, however, to carry out their duties of

assistance with moderation and discretion, and on the other hand, the local authorities must not, on the pretext of irregularity, reject or obstruct the intervention of a consul called upon to protect the merchant marine of his country; on the contrary, they should observe toward him all proper courtesy.

**516.** Consuls cannot exercise coercive power over members of the crew of national merchant ships, who have deserted and are in port simultaneously with the ship. They may, however, request the assistance of the local authorities in returning on board men who in fact belong to the crew and are needed to man the ship. Yet these individuals can only be arrested in conformity with the provisions of the appropriate consular convention. \*

#### DUTIES OF CONSULS IN UNCIVILIZED COUNTRIES

**517.** The duties of consuls in uncivilized countries must, in general, be considered as more extensive than in civilized countries; they must, in principle, be governed by special treaties or by capitulations.

**518.** Consuls must be considered as having, in the countries where capitulations are in force, a right of jurisdiction in civil and criminal matters, as well as the powers assigned to them by the law of their country for the administration of justice and the execution of judgments rendered by them.

As regards the exercise of consular jurisdiction in countries where capitulations are in force, compare rules 357 *et seq.*

See also, Contuzzi, *La istituzione dei consolati ed il diritto internazionale europeo nella sua applicabilità in Oriente*, Naples, 1885,—Féraud-Giraud, *De la juridiction française dans les Echelles du Levant*, Paris, 1866.—Lawrence, *Études sur la juridiction consulaire en pays chrétiens et en pays non chrétiens*, Leipzig, 1880.

**519.** In principle, consuls enjoy, in uncivilized countries, the immunities, freedom and privileges indispensable to the exercise of the powers vested in them. The privilege of extritoriality must be considered as granted to them, and must also be recognized on the part of persons attached to the consulate, such as the

\* [By sections 16 and 17 of the United States Seaman's Act (Act of March 4, 1915 38 Stat. L. 1184) arrest for desertion and the assistance of the local authorities in effecting such arrest were abolished, and directions given to the President to give notice to foreign governments of the termination of any treaties inconsistent with the above provisions of the Act—Transl.]

vice-consul, interpreters, dragomen, and other clerks of the consulate placed under the immediate control of the consul.

**520.** The privilege of extritoriality must also extend to the house where the consulate is established. The local authorities cannot take any jurisdiction over this house; they are bound to protect it in case of public disturbance, as well as the consul and persons attached to the consulate. If he requests it, they must give the consul a safe-conduct, and assure him sufficient protection to insure the inviolability of his person and residence.

The exceptional position of consuls in non-Christian countries and in Musulmen and uncivilized countries makes it indispensable that they be vested with more extensive rights and privileges than those enjoyed by ordinary consuls.

The enumeration of these rights and privileges is found in capitulations and in the various treaties concluded by each state. In principle, however, it must be admitted that, since in non-Christian countries the consul lawfully administers civil and criminal justice and is one of the judicial authorities of the country to which he belongs, he must be considered as invested with all the rights, prerogatives and privileges which are deemed indispensable for maintaining the independence of the foreign state in the exercise of its powers in the administration of justice.

#### PREROGATIVES OF CONSULS UNDER "COMMON" LAW

**521.** The rights and prerogatives of consuls under "common" law must be accorded in principle only to consular envoys (*consules missi*), that is, to those who are citizens of the state which has appointed them expressly to exercise consular functions, with a prohibition against carrying on commerce or business.

**522.** Consular envoys, whether consuls general or vice-consuls, whenever they are accepted and recognized as such under the rules and formalities in use in the country where they are to exercise their functions, are not personally responsible for acts they perform as official representatives of their government, within the scope of their authority under official instructions and of their character as public officers.

As regards acts performed in their official capacity and within the scope of their authority, they engage the responsibility of the state which has appointed them.

Compare, with regard to the submission of consuls to the local jurisdiction, rules 347-350, and as regards the civil or international responsibility of the foreign state, rules 595 *et seq.*, 603 *et seq.*

**523.** Consuls must be fully protected in the exercise of their functions; they cannot be arrested or detained except for offenses involving severe punishment. They cannot be compelled to appear as witnesses before the local courts, nor to appear personally for examination in a criminal case; but their depositions must be taken in writing, or verbally at their residence.

**524.** In every instance, the local authorities must proceed with a foreign consul with all the respect due him by virtue of his public character. When it is necessary to prosecute him for serious offenses, they must advise the government of his country and, if possible, delay the proceedings until it has taken appropriate measures, either by revoking his instructions or otherwise.

The purpose of these rules is to protect the exercise of consular functions, and to prevent the possible injury which might arise if consuls were prevented or retarded in the exercise of their duties. In most consular conventions, it is recognized, in principle, that consular envoys cannot be arrested except in case of offenses considered as crimes and punished as such by the courts of the state where they reside. See the consular convention between Italy and the United States of February 8, 1868, arts. 3 and 4; with Austria-Hungary, of May 15, 1874, arts. 4 and 5; between the United States and Belgium, of December 5, 1868; between Italy and France, of July 26, 1862, arts. 2 and 3.

**525.** In all cases where the consul must appear in person before the local courts, he cannot refuse, but the local authorities must invite him to appear with all possible respect for his position and the official duties committed to his charge.

**526.** Consuls have the right to be exempted from municipal or state burdens or charges imposed on citizens and resident foreigners. They are not subject, therefore, to military billeting, to service in the militia, or to any public service of a municipal character. They are also exempt from the obligation to pay military taxes and direct personal or sumptuary taxes imposed by the state, province or town, unless they own real property or engage in business.

**527.** Consuls may place on the outer door of their offices or residence, the arms of their state with the inscription, *consulate*.

They may also hoist their national flag on their residence or offices, when they do not reside in the capital of the country where the legation of their country is located.

For the inviolability of consular officers, see rules 378-381.

## CONSULAR AGENTS

**528.** Consular agents, whether they are citizens of the state which appointed them, or of the state where they exercise their functions, do not enjoy the same rights as consuls of the first class.

Nevertheless, for acts performed in the exercise of their functions, by virtue of their commission and within the scope of their special authority, they are not personally responsible.

**529.** Consular agents may place on the outer door of their residence or offices, the arms of the foreign state for which they act, with the inscription, *consular agency*.

Under the Italian law, the personnel of consulates is divided into two classes, those who cannot engage in business and must be Italian citizens, and those who may engage in business and may be foreigners. The latter are called vice-consuls or consular agents.



## TITLE XVI

### OF THE PROTECTION OF CITIZENS ABROAD

#### PROTECTION AS A RIGHT OF SOVEREIGNTY

**530.** Every state has the right to protect and defend its citizens residing abroad by all the means considered lawful in international law. It must oppose all arbitrary acts committed against them, and in case of an infringement upon their rights, must support them in legal actions brought to obtain satisfaction for unjust injury, and demand, according to circumstances, appropriate guaranties to prevent the recurrence of similar acts.

**531.** The right of protection of citizens abroad must be exercised particularly by the sovereign of the state and by the diplomatic agents vested with its legal representation. It may also be exercised by consuls in the countries where they are established and within the limits fixed by the consular convention, which determines the attributes of consuls in the respective countries.

The purpose of the foregoing rules is to lay down the principle of the legal protection of the rights of man in the international society. Even in the supposition that these rights would not be recognized by treaties, they ought nevertheless to be always under the protection of the sovereign of the state of which the individual is a citizen. Such sovereign has not only the right, but the duty, to protect citizens resident abroad and to demand for them the application of the laws which must insure the protection of the human person and his rights. Usually, the reciprocal obligation to respect the rights of humanity—established *infra* in title XXII—is recognized, by way of reciprocity, in treaties. Nevertheless, it cannot be claimed that such obligation does not exist in the absence of a treaty, and that the national state of the alien may not come to his defense when his personal rights are infringed.

#### PROTECTION AS A RIGHT OF THE CITIZEN

**532.** The right of citizens to claim the diplomatic protection of the country to which they belong, must be considered as having for its basis the relation resulting from citizenship. Consequently, the proof of citizenship must be considered a prerequisite

for the legitimate exercise of diplomatic action and of the right and duty of protection incumbent on the sovereign towards the citizen.

**533.** Any question concerning the citizenship of the individual who claims the protection of the state, must be decided according to the law of the country to which said individual claims to belong.

The diplomatic action of the government of each state can be recognized as legitimate only when such individual has not, under the law of his native country, lost the citizenship of that country.

**534.** When the citizenship of the individual who seeks protection is a matter of doubt, and especially when he has left his native country without any intention of returning, the result being that he has in fact broken the ties which bound him to his country, it must be considered as contrary to political expediency and equity (even though not opposed to strict right) to set in motion the state's diplomatic machinery for the advantage of a person who, having renounced his native country, seeks afterwards to avail himself of its political forces to defend his interests.

It cannot be considered wise policy to place the state's diplomacy at the service of individuals who unquestionably cannot be regarded as citizens of the state whose protection they request.

#### WHEN PROTECTION MAY BE LEGITIMATE

**535.** The protection of citizens must be considered legitimate whenever, according to the principles of "common" law, the international responsibility of the state against which diplomatic action is being exercised must be considered as well-founded.

**536.** International responsibility may, in principle, arise from unlawful acts of the government or of public officers, which acts constitute a violation of the rights of person or property of citizens of the state which exercises the diplomatic action.

This rule may be applied to damages caused to foreigners during revolutions and civil wars, which frequently disturb the American republics, and during which the rules of international law are not always observed.

**537.** The international responsibility which may justify diplomatic action may also arise from contractual engagements undertaken by the state with private individuals, when, under the circumstances, the non-performance of the contract can be consid-

ered a result of bad faith of the government, which has misused its power to violate the legitimate rights of private individuals, refuses them the legal protection to which they are entitled and commits to their detriment a veritable denial of justice.

**538.** Although in a treaty concluded between the state which exercises the diplomatic action and the state against which the action is directed, there may have been an express stipulation of a reciprocal obligation to refrain from any interference in all matters relating to the administration of justice, such an engagement cannot limit diplomatic action in case of denial of justice, as that fact must be considered a manifest violation of the principles of international law.

These rules may be applied in case of the protection of citizens, creditors of a foreign state. While in principle the claims of those creditors cannot justify diplomatic action, when they have at their disposal means of judicial recourse to protect their rights and interests, yet when the government of the debtor state acts in bad faith to obstruct the ordinary course of justice and thus infringes directly upon the intangible rights of the individual, diplomatic protection may then be considered legitimate.

#### INDIVIDUALS MAY NOT LIMIT THE RIGHT OF THE STATE

**539.** When individuals, in contracts concluded with a foreign government, have expressly renounced the right of protection on the part of their own government such stipulation cannot have legal force to prevent the diplomatic action of their national government, when lawfully exercised.

Protection must not be considered as an enforceable right of a private individual, but as a public right and duty of the state in its relations with foreign states. It must be admitted that protection has as its basis the relations existing between the sovereign of the state and the collectivity, to which belong the citizens in whose favor diplomatic action is exercised. The sovereign, as the supreme organ of right, must legally protect the rights of the individual members of the collectivity, in so far as those rights are exercised within the domain of international relations.

#### RATIONAL LIMIT OF PROTECTION

**540.** It is incumbent upon prudent and enlightened governments carefully to examine and weigh all the circumstances in order to determine whether diplomatic action should be exercised.

Even admitting the widest discretion and freedom of judgment on the part of the government in its decision as to the grant or refusal of diplomatic pro-

tection on behalf of citizens who allege injury by foreign governments, we are of the opinion that interfering in the financial or judicial administration of a foreign state must always be considered as a grave and delicate matter. It often happens that contractors and speculators take advantage of the circumstances in which the American republics are placed (especially during their internal strifes) to use their money in more or less successful operations, and then invoke the diplomatic protection of their government in order to realize the exaggerated profits they wished to obtain. Without entering into details, we shall merely say that the main question which any prudent government must seriously examine is whether the claims are or are not justified, taking into account the good or bad faith of the government against which they are directed. It cannot be admitted in principle that those who risk their money by entering into more or less speculative contracts should not run the risks of their undertaking.

**541.** Governments must not exaggerate diplomatic action by diverting it from its true purpose, so as to make of a question of private law a matter of international interest, unless, owing to peculiar circumstances, the dignity of the state is involved.

It must always be considered contrary to a wise and prudent policy to make the case of a private individual the case of the government. Compare: Phillimore, pt. V, chap. II, v. 2; and Heffter, *Droit international*, § 58.

**542.** Protection designed to secure for citizens residing abroad a privileged position must be considered unlawful and unjustifiable:

- a. When it is exercised with a view to substitute diplomatic action for the action of the territorial sovereign;
- b. When it is so exaggerated as to be equivalent to a pressure by a powerful state upon a weak state to procure for its citizens unjustified advantages or exemption from obligations arising under territorial law.

These rules tend to exclude undue protection on the part of powerful governments, which have sometimes demanded from weaker governments that their citizens, established in foreign countries to engage in business, should not be subject to local laws, or should obtain through administrative channels the protection of their rights, notwithstanding the existence of judicial means by which such protection might have been obtained.

Among the different cases of undue protection, see the case of MacDonald mentioned by Calvo, *Droit international*, 4th ed., § 1279. Compare: Fiore, *Diritto internazionale pubblico*, 4th ed., v. I, pp. 412 *et seq.*

#### PROTECTION OF NATURALIZED PERSONS

**543.** The right of protection appertaining to the sovereignty of each state may be exercised even with respect to naturalized per-

sons, provided that they are not protected against the state of which they were citizens originally, for the purpose of exempting them from the performance of duties and obligations which subsist notwithstanding the change of nationality.

This rule tends to exclude the protection of a naturalized person against his native country, in cases where he is called to perform certain duties which he has failed to fulfill before emigrating, for instance, that of military service. In the case of Meyer, a Prussian citizen naturalized in the United States who, having returned to Prussia was compelled to perform his military service, the just principles governing the situation may be found in the note of Baron Manteuffel to Mr. Fay, United States Minister, dated October 2, 1852:

"When any individual obtains naturalization in a foreign country, the government of his native country can never acknowledge that this fact, of itself, releases him from the obligations which were imposed upon him in his former country before his naturalization. I will add, that in cases like this, in which the said Meyer finds himself, it is much less a question of retaking any individual to enroll him in the army, than to maintain the respect due to the law, and to insure its execution. And if the government of his Majesty proposes to execute the law against a Prussian subject on Prussian territory, I desire to persuade myself that the government of the United States has too much respect for its own dignity to be willing to oppose itself thereto." (36th Congress, 1st session, Senate Ex. Doc. No. 38, 1860.)

**544.** The right of protection may be exercised by a state with respect to individuals who, though not its citizens, happen to be its *protégés*.

Among these we may consider not all the persons who ask and obtain the protection of the diplomatic agents of a given state, but those who, by virtue of treaties concluded with Oriental states and uncivilized states, may lawfully claim the condition of *protégés*, and who in fact must be considered as assimilated to the citizens of the protecting state.

This rule applies to individuals in the service of ambassadors and consuls in Oriental countries and in uncivilized states, who, under the treaties, have in fact the same legal status as citizens, as long as they exercise their functions as employees. Compare the treaty of July 3, 1880, concluded by Italy and other states with Morocco (*Martens*, N. R. G., 2d série, v. VI, p. 624), in which the condition of *protégés* is regulated. See also Oppenheim, *International law*, v. I, § 295.

## TITLE XVII

### INTERNATIONAL DUTIES OF THE STATE

#### GENERAL PRINCIPLES

**545.** Each state is bound to respect the international rights of the other members of the international society and to exercise all its functions, activities and rights in such a way as not to infringe upon the rights of others.

The purpose of this rule is to formulate the general principle of equilibrium and of legal organization, which can be maintained only on condition that a state does not encroach upon the domain of others and that each one renders to others their due. The existence in common of persons who have identical rights cannot be conceived without presupposing the constant observance of a certain law of proportion as to their actions and forbearance of action. Otherwise, their coexistence would be impossible. The rights of states set forth in the foregoing titles have as a necessary complement duties which each is bound to observe.

**546.** Moreover, it is incumbent upon states and on the governments which represent them to recognize the authority of moral law and natural justice and not to violate their precepts either in war or in peace.

Moral law, which should regulate all the relations of reasonable beings, must apply to all the relations arising among civilized peoples who constitute the international society. The observance of the principles which that law imposes characterizes civilization and gives rise to all the duties known as *duties of humanity*.

**547.** The principal international duties of states are:

- a. The duty of non-intervention;
- b. The duty of collective intervention;
- c. The international duty of mutual assistance;
- d. The duty of international responsibility;
- e. The duties of humanity.

In addition, states have the general duty of performing honestly and in good faith the obligations contracted by virtue of treaties, or express or tacit agreements, or which arise out of any acts they may have undertaken in international society.

## TITLE XVIII

### DUTIES OF NON-INTERVENTION

#### INTERVENTION MUST BE DEEMED ABSOLUTELY UNLAWFUL

**548.** Each state is bound not to interfere in the affairs of other states, with a view to obstructing or preventing the free and independent exercise of their rights of sovereignty and the free development of all the functions and legitimate activities of government.

**549.** Intervention must be considered absolutely unlawful.

Interference in internal and external affairs effected by moral force constitutes moral intervention; that effected by armed force constitutes armed intervention. Both must be deemed absolutely unlawful and considered as a violation of international law.

**550.** It must be deemed as absolutely prohibited:

- a. To intervene in a struggle between a sovereign and people who desire to modify the political constitution of the state or the form of government;
- b. To hinder the free development of the constituted government and of public administration;
- c. To interfere with the exercise of the powers of the state by hindering in any way whatever the right of each state to enact its laws with entire independence; nor should it violate international law, either by restricting the independence of the judiciary, or by seeking to influence appointments to public office or the development of sovereign functions, etc.
- d. To indulge in any direct or indirect attack against the autonomy and independence of the state.

The duty of non-intervention, in any question concerning the political constitution of the state and the free exercise of any sovereign function and power within and without the state, is the indispensable condition of the real and effective autonomy and independence of the state. Every right is correlative to a duty and it is clear that the rights of sovereignty which have been mentioned in the foregoing titles imply the correlative duty of respecting law and

refraining from any interference on the part of other states. This duty has been more generally recognized in the second half of the 19th century. Since the treaty of Vienna of 1815, which laid down as the basis of the new organization of Europe the maintenance and defense of the territorial possessions of the reigning dynasties and of the rights accorded to each of them under that treaty, armed intervention was justified by the pretended necessity of maintaining the organization of Europe as it was established and of maintaining the balance of power. See the history of the armed interventions to arrest the liberal movement in Spain, at Naples, in Portugal and elsewhere, in Calvo, *Droit international*, v. I, §§ 168 *et seq.*

**551.** The immediate injury and the detriment to national interests and prospects, which may indirectly result from a revolution within a foreign state and from civil war, do not justify armed intervention.

There is a tendency at the present time to give to international society the legal organization that it needs and to establish the dominance of law and justice. It may happen that acts occurring within a state may be detrimental to the interests of a foreign state; but it should not be admitted that the state which claims to have been injured thereby may become in fact judge and party at the same time and render justice to itself by its own intervention. The observance of the procedure provided for by international law for the protection and safeguarding of reciprocal interests must be considered indispensable among states existing in common in the *Magna civitas* for the maintenance of the supremacy of law.

**552.** When revolution and civil war in a state result in real and actual injury to the rights of another state, the latter may defend itself by all the means permitted by international law.

To protect one's own right is not committing an injustice against others. It should be considered unlawful to meddle in the internal political affairs of a foreign country, and to use moral or material force to make one's will or designs prevail. If, however, a revolutionary party, in order to gain adherents, seeks to overturn the political institutions of a neighboring country, the right of every state to assure its own defense by every available means would justify resistance and action, as the case may be. It could also employ armed force to repel unjust invasion, and to combat the direct action of the revolutionary party. This would not in reality be intervention, but an act of legitimate defense, which might sometimes give rise to a *casus belli*.

#### INTERVENTION CANNOT BE JUSTIFIED BY A TREATY

**553.** Intervention in internal affairs to assist a foreign government in case of civil war cannot be considered lawful, even though it might occur under the terms of a treaty and with the formal consent of the erstwhile constituent government; indeed, it should always be considered as a palpable violation of the international rights of the people.



Compare rules 89 *et seq.* [By article 3 of the treaty of May 22, 1903, between the United States and Cuba (Malloy, *Treaties*, p. 362) it was agreed "that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty," etc.—Transl.]

**554.** Intervention by a state by means of its moral and armed force to maintain the political organization of another state cannot be justified on the ground that it is done under the express stipulation of a previous treaty concluded between the governments reciprocally to guarantee their territorial possessions, or the pretended rights of reigning dynasties.

This rule is based on the principle that the right to provide for the internal organization of the state and for its political constitution vests originally and wholly in the people, and that sovereigns cannot, through the stipulations of treaties, deprive the people of the complete right to govern themselves and administer their affairs with the fullest independence. The pretended rights of reigning dynasties founded upon historical right and other titles cannot ever weaken the international rights of peoples and nations and therefore cannot legitimate the use of armed force and the assistance of foreign states through intervention. This rule does not bar a defensive alliance between two nations, which may legitimate armed assistance when the *casus fœderis* is applicable to the defense of the rights of the state or of its people, but not those of the government or dynasties against the people.

#### INTERVENTION IN FAVOR OF THE POPE

**555.** The absolute duty of non-intervention in the internal affairs of a state cannot suffer any modification on the ground that its object is to safeguard the pretended rights of the Papacy and its aspirations toward temporal power.

One of the most specious sophisms of the Papacy and of its partisans, is the pretended necessity of temporal power and political sovereignty on the part of the Pope to insure to him the most complete independence in his functions as head of the church. It was through this fallacy that they sought to justify, at Rome, the intervention of France, which maintained its troops there until 1870, on the pretext of protecting the interests of the Catholic Church and of its head. Rules 74 and 75 and those we shall set forth hereafter to establish the exercise of the rights of the Church, exclude the necessity of political and temporal sovereignty on the part of the Pope. Certain attempts have been made, especially by Catholic bishops, to urge governments to intervene at Rome, in order to restore the temporal sovereignty of the Pope; but from this time on, it may be considered as established that intervention for such purpose is contrary to the principles of modern international law.

The legal safeguard of the international rights of the Church, as they are set out in rule 73, may be the object of collective legal protection, in conformity with the principles embodied in rules 49, 50 and following and of the other rules concerning collective interference which are set forth in the following title, but it could never legitimate intervention as the individual action of a state.

## TITLE XIX

### DUTIES OF COLLECTIVE INTERVENTION

#### WHEN IS INTERVENTION REQUIRED

**556.** Collective intervention must be considered obligatory when its object is to protect the rights of the persons and legal entities who are members of the international society, and whose rights have been determined in titles I and II preceding.

Compare rules 62, 67, 73, 79, 89, 92, 97.

In order fully to understand the foregoing rule, we must bear in mind that collective intervention may be justified by the idea of asserting the supremacy of law. Its ultimate purpose should be the realization of the words of Mirabeau: "Law will some day be the sovereign of the world." Hence any arbitrary violation of the rights of persons (state, men, people, nations or churches), can never be justified by virtue of the European concert.

We reprint what we said at page 249 of the third edition of the present work in reference to the question of Crete:

"In the question of Crete or Candia, which is being discussed at the present time, we cannot deny that the intervention of the great powers is required as an international duty to proceed by common agreement to the solution of the Eastern question. We are even convinced that the most urgent duty would be not to delay its solution in conformity with the most just principles of modern international law. Nevertheless, the European nations have sought to conform to the political views of the most powerful governments, which desire to secure the integrity of the Ottoman Empire, principally because they are not all in accord as to the regulation of the new order of things which would result from the emancipation of the Christian provinces subject, by historical right, to the authority of a Mussulman ruler, and because they fear the danger of a European war if the integrity of Turkey were disturbed.

"The bombardment of Candia and the threat of blockade of the Piræus to compel the universal acceptance of the law made by the European concert, to respect the integrity of the Ottoman Empire and to subordinate the just aspirations of the Cretes or Candians to this supreme necessity, is not at all in keeping with the principle formulated in our rule. Coercive measures would have been more justified if they had compelled everyone, including Greece, not to oppose the right of the Cretes to adopt the political constitution most conformable with their national aspirations with complete autonomy and independence. The time, on the other hand, has not yet come to give to collective intervention—which in principle must be admitted to be just and legitimate—rational rules determining its exercise and development. It will be necessary to wait until public opinion, which in that case displayed its power and force, acquires a greater influence in the direction of international politics."

**557.** Collective intervention must be considered as a form of protection of international law, and must be deemed legitimate only when its object is to protect or restore the authority of "common" law violated by one or more states.

Compare rule 49.

To determine clearly the conception of collective intervention and its legitimacy, it must be remembered that its main object is the legal protection of international law. We cannot admit, in principle, that all that the great powers have established by common accord may be justified by virtue of the so-called European or American concert. To admit this, would, under another form, restore the preponderance of the pentarchy, which was the consequence of the concert established by the great powers at the Congress of Vienna in 1815. In that Congress it was thought that, in order to maintain the so-called balance of power and secure peace, it was indispensable to preserve territorial possessions under the rule of the reigning dynasties, to which they had been assigned even by resorting to coercive measures. Thus originated the erroneous conception that everything could be justified by agreement of sovereigns and they sought in this manner to justify the armed interventions planned at Laybach in 1821 and at Verona in 1822 to repress the liberal movements in the Kingdom of Naples, in Piedmont and in Spain.

If everything could be justified under the so-called European concert, by reason of the accord of the great powers, it would result in strengthening the autocracy of politics and justifying recourse to arms to maintain it. There would thus ensue a return in another form of conditions similar to those which arose from the erroneous conception of the legitimacy of constituted powers as conceived by Metternich and the disregard of the sacred and inviolable rights of peoples.

In his note of May 12, 1821, Metternich, to justify the concert of the great powers as to armed intervention, wrote as follows at Laybach:

"The useful or necessary changes in legislation and in the administration of states can only emanate from the free will and the deliberate and clear judgment of those whom God has made responsible for the power. Everything which departs from this principle, necessarily leads to disorder, to disturbances, and to evils more unbearable than those it is sought to remedy. Convinced of this eternal truth, the sovereigns have not hesitated frankly and vigorously to proclaim it. They have declared, that in respecting the rights and independence of all legitimate power, they regarded as legally null and in conflict with the principles constituting the public law of Europe, every alleged reform brought about by revolt and open force. They have acted upon this declaration in the events which occurred at Naples and in Piedmont."

Our conception of collective intervention must not be confused with that which inspired the so-called European concert, whose traces are still visible in contemporary political history.

**558.** Collective intervention may also be considered obligatory when its purpose is to put an end to conditions of anarchy which might continue for a long time and prove highly detrimental to international trade, industry and general interests.

The revolution which broke out in June, 1875, in Bosnia and Herzegovina and lasted so long that it endangered general peace, brought about the inter-

vention of Germany, Austria-Hungary, Russia, France and Italy, who offered their mediation, so as to facilitate the pacification of the provinces subject to Turkey. Great Britain refused to join it, because, as Lord Derby wrote in his note of August 24 of that year, the British government believed that interference would encourage the insurrection and would assume the character of an intervention in the internal affairs of Turkey. This is not the place to discuss the political views of governments in this respect; we merely wish to say, that if in such cases, collective intervention is not considered obligatory, it must be deemed permissible and justifiable. The main point in this matter is that states agree upon the need and expediency of such a measure, or, in other words, that a considerable number of states, representing the majority, recognize that interference is justified by the circumstances.

Thus, by excluding, in so delicate a matter, the predominance of individual judgment and by recognizing the necessity of the agreement, not of several, but of the majority of states, the danger that our rule, as formulated, may lead to arbitrariness is dispelled.

The arguments set forth in the note of December 30, 1875, to justify collective intervention as regards Bosnia and Herzegovina, seem to us to justify the measure: "The state of anarchy," the note reads, "which prevails in the North-East provinces of Turkey, does not merely imply difficulties for the Porte. It also involves grave danger to the general peace, and the various states of Europe cannot with indifference observe the perpetuation and aggravation of a situation which now weighs heavily upon commerce and industry and which, as it daily continues to shake the public confidence in the maintenance of peace, tends to compromise the interests of all."

#### WHEN COLLECTIVE INTERVENTION MAY BE JUSTIFIABLE

##### **559.** Collective intervention is justifiable:

- a. When its object is to prevent or to put an end to a state of affairs contrary to law: such as the incorporation of a territory by conquest, the execution of a treaty imposed by violence on the vanquished by the victor and any acts which must be deemed unjust and illegitimate under "common" law;
- b. When it seeks to repress the violation of an order of things previously established by a general treaty, a violation arbitrarily committed by one of the contracting parties to the detriment of the other parties;
- c. When one of the parties fails to carry out the particular stipulations of a general treaty, thus violating the right of those for whose benefit the stipulations were made, provided the wrongdoing party acts arbitrarily and in bad faith.

The second part of the rule would find its application in case one of the powers which subscribed to the treaty of Paris of 1856, or the treaty of Brussels of July 2, 1890, for the repression of the slave trade, were to fail to observe the

rules laid down in these conventions with respect to maritime war or the repression of the traffic in slaves. Such would be the case of a state which, in the event of war with another state, failed to respect the rule relating to real and effective blockade, or which would not honestly fulfill its obligations concerning the repression of the slave trade. In such case, it would be fair to maintain that the state which violated, to the prejudice of another state, the rules agreed upon in a general treaty would not merely violate the right of that state but of other powers as well, since all the states are jointly and severally interested in seeing that the rules established among them by common consent are respected.

The other part of the rule would find its application in the case of Turkey not observing the stipulations according to which, under article 61 of the treaty of Berlin of July 13, 1878, it has assumed "to effect without delay the improvements and reforms required according to local needs in the provinces inhabited by the Armenians and to guarantee their security against the Kurds and Circassians." Collective intervention would be justified, not only by reason of the general principles according to which the respect of the law established by common accord among states must be recognized, but also by reason of the particular fact that Turkey failed, as it was bound to do, to report to the other signatory powers of the treaty the nature of the measures adopted, so as to make it possible for them to *supervise* the execution of its stipulations.

#### WHEN COLLECTIVE INTERVENTION MAY BE UNJUSTIFIABLE

**560.** Collective intervention in the public administration and exercise of the sovereign powers of a foreign state may be considered a violation of the rights of autonomy and independence of that state, and therefore illegitimate, whenever it is not based upon protection of national interests.

Therefore, if a government takes undue advantage of its position in its relations with private individuals, violates its duly contracted obligations, declines to heed the just claims of foreigners, or exercises its sovereign powers contrary to the principles of justice and in creating a state of affairs essentially abnormal,—collective intervention to repress open violence and prevent violation of the absolute principles of justice may be considered lawful and justifiable.

One is bound to admit that a moral law exists between states and that they are bound by a natural and reciprocal obligation to maintain intact the fundamental principles of "common" law. If it could ever be maintained that a state may with impunity violate those principles and that the other states would be bound to remain indifferent, it would be impossible for international society to exist. Therefore, a collective remonstrance can always be justified as a protection of law against arbitrary and persistent infringement. Compare rule 537.

## INTERVENTION IN THE RELATIONS BETWEEN THE CHURCH AND THE STATE

**561.** Collective intervention on the part of Catholic or non-Catholic states may be legitimately exercised to protect the international rights of the Church or to insure the performance of its international duties.

It should be considered, however, as inherent in the autonomy of each state to regulate its relations with the Roman Catholic Church, in so far as such relations are within the sphere of operation of public municipal law, and to provide, in accordance with municipal laws, for safeguarding the dignity of the head of the Church.

The purpose of the first part of this rule is the legal protection of the rights of the Roman Catholic Church which, as an international institution, must be considered as a person of the *Magna civitas* (compare rules 70 and 71.) Its rights (compare rule 73) must be deemed under the collective guaranty of all states, which have the right to safeguard the interests of Catholic citizens and their religious liberty.

The purpose of the second part of the rule, on the contrary, is to safeguard the autonomy of the state as regards its powers over persons, over the collectivity and any association belonging to such collectivity,—an autonomy which cannot be limited with respect to the churches existing in the state (not excluding the Roman Catholic Church) in so far as, in the exercise of their functions and worship, they are in the juridical circle within which the rights of the state must be exercised with full independence.

If the rights of these two institutions—the state and the church—each one of which has its *raison d'être*, its own rules of operation, and an essentially distinct purpose, could be determined and fixed by a solemn declaration made in a congress, the conflicts between the two powers could be more easily adjusted. Under the present conditions, it may well happen that one of the institutions insists that the other has encroached upon its rights. In order to avoid a conflict, such an occurrence would give occasion to resort to all peaceful means, that is to say, to good offices, mediation, and finally, to collective intervention and arbitration.

## GENERAL PRINCIPLE

**562.** The rules relating to collective intervention apply to all the states that are in the *de facto* society and must be considered as jointly and severally interested in maintaining intact the respect of international law and in restoring its authority in case of arbitrary violation.

Compare rules 43 *et seq.*; 49 *et seq.*; 245.

## TITLE XX

### DUTY OF MUTUAL ASSISTANCE

#### GENERAL PRINCIPLES

**563.** Civilized states must consider themselves bound, independently of treaties, to do what the exigencies of common life may require. They must consider themselves reciprocally bound to afford mutual assistance and not to oppose in any way whatever acts may help to promote their reciprocal advantages and safeguard their respective interests.

**564.** Duties of mutual assistance and those arising from the foregoing rule cannot be considered as legal duties but as obligations based on moral law and on the *comitas gentium*; they must be applied not only among civilized states, but also govern relations with states which are in an inferior condition, from the point of view of culture and civilization.

Compare rules 17, 19 *et seq.*, and 31.

**565.** Assistance must be considered especially obligatory:

- a. With respect to ships seeking shelter because of the necessities or dangers of navigation;
- b. With respect to vessels which have suffered a disaster at sea or are shipwrecked;
- c. With respect to the acts necessary for the administration of justice or the trial of lawsuits.

#### ASSISTANCE TO FOREIGN SHIPS SEEKING SHELTER

**566.** Each state, independently of treaties, must receive foreign ships in its ports, whether they are war vessels or merchantmen, when they are compelled to enter, either by reason of the dangerous condition of the sea, or to repair damages suffered during the voyage, or to procure what they may need to proceed on their way.

**567.** Foreign ships compelled by reason of *force majeure* to enter

the territorial waters of a state must be protected and be exempted from the ordinary laws applicable to ships entering for commercial purposes.

**568.** Any ship which, compelled by a disaster at sea, wishes to enter the ports of a foreign state, whether closed or open to trade, and to land in roadsteads, bays, or on beaches must display the customary signals to indicate the forced nature of the landing, and may require that the local authorities shall not only not prevent her from landing, but give her all necessary assistance to make repairs, take in provisions and proceed on her way.

**569.** No civilized state should consider as a commercial act the unloading and reloading of merchandise by a foreign ship which was obliged by *force majeure* to enter; nor can it subject to "common" law the operations of revictualling and selling of damaged goods, the reshipment of merchandise on another ship by one which, through damage at sea, has become unseaworthy. Such operations, however, must have been recognized as necessary and duly authorized by the customs authorities.

The rules applicable to foreign ships which by force of circumstances enter territorial waters, are ordinarily stipulated in treaties of commerce. When there is no treaty, every question must be settled by administrative regulations in conformity with the principles of equity. A foreign ship which is forced to put into port cannot be exempt from the payment of compensation due under the regulations to private individuals who have lent their assistance, for example, the local pilots who steered her in. But one should always consider it contrary to the principles of international law and to the moral duty of mutual assistance to regard as commercial transactions those which a ship is compelled to undertake in order to make herself seaworthy.

**570.** It is incumbent on foreign ships which enter by *force majeure* to conform to the instructions given by the local authorities according to the requirements of the case. It is incumbent, moreover, on the local authorities not to subject these ships to conditions which might be considered excessive and inconsistent with the international duty of mutual assistance.

#### ASSISTANCE IN CASE OF MARITIME DISASTER OR SHIPWRECK

**571.** Every state is bound to organize the maritime services required to assist foreign ships, in danger within territorial waters or along the coasts of the country, and to do all it can to prevent shipwrecks and all other maritime disasters.



**572.** In case of shipwreck or any other disaster, it is the duty of the state which has jurisdiction over the territorial waters to provide aid for the ship and endeavor to rescue property and preserve it for its owners.

**573.** The operations incidental to salvage must, in principle, be undertaken by the consul of the state to which the ship belongs, and it is the duty of local authorities to lend him assistance. In the absence of the consul, the maritime authorities of the port and the civil authorities of the coast where the disaster occurred must be considered as bound to undertake salvage and to recover the wreckage.

The obligation to help ships in danger is a duty of humanity. Certain states have in their laws made it a legal obligation. Italy, for example, in the Merchant Marine Code, provides as follows in article 120: "The captain of a national vessel, meeting any ship, even foreign or enemy, in danger of being wrecked, must hasten to her assistance and help her in every possible way." Article 385 of the same Code punishes the captain or master of a national vessel by a fine from 200 to 1000 lire, and by suspension from his position from six months to a year, if he negligently fails to assist a ship in danger.

**574.** The state must refrain from exercising any royal or fiscal right to wreckage or to the ship wrecked in territorial waters, and also from the right to appropriate articles cast up by the sea in consequence of a shipwreck or a disaster on the high sea.

**575.** The organization of the salvage service must be considered as within the duty of international assistance. Accordingly, each government must defray the expenses required for such service, and cannot ask reimbursement from the foreign state whose merchant vessel was wrecked. It may only request the repayment of the actual expenses incurred in order to rescue the ship and the property wrecked.

#### RULES RELATING TO SALVAGE AND PROPERTY SALVAGED

**576.** It is incumbent on each state to provide by legislation that all local authorities and especially maritime authorities shall give assistance to the wrecked, shall undertake salvage and protect the rights of shipowners and of property belonging to the shipwreck.

**577.** The appropriation of articles proceeding from a wreck or any other maritime disaster should be prohibited.

It should be considered unlawful on the part of salvors to make

exaggerated salvage claims. It is the duty of the local authorities to see that all salvors obtain a reward commensurate with the service rendered; including the promptness of the rescue or salvage, the danger incurred, and the value of the property saved.

**578.** All property saved from a shipwreck must be kept in a safe place, at the disposition of its owners, under the care of the local authorities, who must give public notice of the salvage and invite the interested parties to prove their claims to the property saved.

**579.** The local authorities may order the sale of perishable merchandise or of goods whose preservation would cause excessive expense, and hold the proceeds at the disposal of the owners.

Moreover, they may order the sale of property saved whenever such course is necessary to pay salvage expenses and the expenses of feeding the shipwrecked persons and sending them back to their own country.

**580.** The state may appropriate property saved or the price of property sold, only when, after a reasonable time following public notice to the interested parties to present claims, none shall have appeared, and the property saved may, therefore, be presumed to be without an owner.

**581.** A ship submerged in territorial waters without leaving any apparent trace, shall be considered abandoned by her owners, or by those interested in her and her cargo, when, notwithstanding public notice, no one has appeared to undertake salvage operations within a reasonable time indicated in the notice (3 months) or when the interested parties, having commenced salvage, have abandoned it for a reasonable time (4 months) so as to permit the presumption that they intend to abandon the ship and cargo. The property may then be turned over to the Treasury or to the actual salvors.

These rules are for the most part in accordance with those adopted by Italy (chap. XII, title II of the *Codice per la marina mercantile*).

The statutes of the Italian maritime cities sanctioned the most liberal principles with respect to assistance in case of disaster or shipwreck. (See the Statute of Pisa of 1160, *Constitutio usus*, Pardessus, *Lois maritimes*, v. 4, 583; Statute of Rimini of 1303, Pardessus, *id.*, v. 5, p. 113.)

#### ASSISTANCE TO SHIPWRECKED SAILORS

**582.** It is the duty of every civilized state to assist foreign sailors who, owing to shipwreck or other maritime disaster, are

without means and (in the absence of a consul of the state whose flag the ship flies) to provide for them until they can find employment or return home.

The state may, however, demand reimbursement for expenses incurred for the maintenance and return to their own country of foreign shipwrecked sailors, unless otherwise provided by treaty.

## ASSISTANCE TO FACILITATE THE ADMINISTRATION OF JUSTICE

### COMMISSIONS ROGATORY

**583.** It must be considered an international duty of mutual assistance on the part of states, independently of treaties, reciprocally to co-operate in every possible way in the administration of justice in civil and criminal cases.

**584.** It must always be deemed a reciprocal moral duty for the respective judges of two states to execute commissions rogatory and to proceed, on request of the foreign judge, to hear witnesses, take depositions on interrogatory or undertake judicial acts of any kind which may be useful to the foreign court having jurisdiction of the case in the administration of justice.

Article 171 of the Italian consular law reads as follows: "Consuls are authorized to execute commissions rogatory which are addressed to them by foreign tribunals for the purpose of undertaking personal visits, making inspections and hearing witnesses, and of receiving the depositions of citizens resident or temporarily sojourning in the consular district."

**585.** It is desirable, in order to hasten the proceedings, to admit direct correspondence between the judges of civilized states, leaving it to the judge to decide as to the legality of the rogatory commission and the expediency of executing it.

In case of the incompetence of the court upon which the request is made, it should be bound to transfer the commission rogatory to the competent territorial court, so advising the commissioning court.

The rule of direct correspondence between the respective judges is admitted in the convention between Austria and Italy of June 11-21, 1867, by which the two governments reciprocally consented, in the interest of the dispatch of civil and criminal proceedings, to allow neighboring judicial authorities to correspond directly with one another in certain cases.

## EXECUTION OF COMMISSIONS ROGATORY

**586.** Judicial authorities must not consider themselves obligated to execute commissions rogatory in the absence of a special convention between the two states. If, however, the commission should be executed by reason of the duty of mutual assistance, such voluntary execution would imply the obligation of reciprocity between the two states.

**587.** The judge to whom the commission is issued cannot execute a rogatory commission which would violate public territorial law. In case the commission does not violate it, the judge should follow the law of his own country in the matter of the formalities of procedure relating to the execution of the commission.

When, owing to the necessities of foreign justice, a special form of procedure may be required and indicated in the commission rogatory, the territorial judge may follow the formalities of procedure indicated, provided they are not contrary to the provisions of the territorial law.

The purpose of this rule is to dispel the difficulty which may present itself when, under foreign law, the complaint cannot be valid unless accompanied by certain formalities of procedure. In such case, by reason of the duty of mutual assistance, the judge to whom the commission is issued, may, when the local law is not opposed and the required formality is practicable, comply with the formalities indicated in the commission rogatory.

## ASSISTANCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE

**588.** It is incumbent upon states reciprocally to assist each other in the administration of criminal law so as not to allow an individual suspected of an offense to escape the judgment of the competent tribunal, and not to allow him when convicted, to enjoy immunity from punishment.

Beccaria said that nothing can prevent crime better than the firm conviction that the offender cannot find any place to escape punishment.

**589.** By reason of the moral duty of reciprocal assistance, independently of treaties, it is the duty of states to co-operate in bringing about the regular course of proceedings for the prosecution of "common" law offenses and to permit the foreign judge competent to try the case to request the territorial judge to execute, within the limits of his jurisdiction, any judicial acts requested of him in the interest of justice.

No judicial act may be requested or executed in the case of a prosecution involving a political offense.

590. It should be considered a duty of civilized states to determine by means of extradition treaties the reciprocal obligation to deliver over fugitive criminals accused of a "common" law offense—not in the nature of a political offense—or tried and convicted for such an offense without having paid the penalty, who have taken refuge on their respective territories.

591. In the absence of an extradition treaty, or in the case of an offense not provided for in the treaty, the authorities of the country where the offense was committed may, however, request extradition.

The state upon which the demand is made, may in accordance with the requirements of the territorial law concerning extradition deliver the criminal accused of a "common" law offense to the state where the offense was committed.

In case an offense, which under the territorial criminal law and under that of the state where the offense was committed is punishable by a restriction of personal liberty for not less than three years, the government of the state of refuge should either offer extradition or punish the criminal according to territorial law.

The surrender of criminals must undoubtedly be considered a legal obligation when it is stipulated in an extradition treaty. Furthermore, it must be admitted that all states being interested in maintaining order and general security and in preventing the political injury resulting from the non-punishment of offenses, the surrender of the criminal to his natural judge (who is the judge of the place where the offense was committed) must be considered a moral duty reciprocal on the part of all states desiring the proper administration of criminal justice. Of course, it is incumbent upon the government of the country where the criminal took refuge to see that the judicial authorities, after examining all the facts, decide whether or not the extradition may be granted. When, from all the facts, a serious presumption of the guilt of the criminal arises, a refusal to surrender him must be considered contrary to the principles of modern law which tends to strengthen the idea of solidarity of civilized states in the punishment of offenders to safeguard the respect and authority of law, a conception more just and rational than that which prevailed in former times, which was inspired by ideas of antagonism, indifference and egotism.

Compare: Fiore, *Effetti internazionali delle sentenze penali e dell'estradizione*, Turin, Loescher, 1877; and *Droit pénal international*, translated by Ch. Antoine, Paris, Pédone-Lauriel, 1880.

The new Italian Penal Code sanctions the principle that a foreigner, who has committed abroad, to the prejudice of another foreigner, an offense punishable under Italian law by a penalty restrictive of personal liberty for at least

three years, and who has taken refuge in Italy, must be punished even if there is no extradition treaty, and in such case extradition must be offered by the Italian government to the government of the state where the offense was committed, or to that of his country, and when neither government accepts such offer, he must be tried by the Italian courts at the request of the Minister of Justice, and punished, subject to a reasonable diminution of the penalty (art. 6).

**592.** The duty of reciprocal assistance for the proper administration of criminal justice, should not be considered as limited where a preliminary examination may be required by reason of a prosecution directed against a citizen of the state whose assistance is requested, said citizen having been arrested by a foreign government and detained for trial. The same would apply where the extradition of a citizen is requested.

This rule meets with very grave contradictions. The opposite principle is, indeed, sanctioned by legislation. (Compare art. 9 of the Italian penal code; art. 36 of the Austrian criminal code; § 9 of the preliminary provisions of the criminal code of the German Empire; Belgian law on extradition of March 15, 1874; Dutch law on extradition of April 6, 1885.) The extradition of citizens is usually excluded by treaties. Therefore, it is contrary to the most generally admitted principles to surrender a citizen in the absence of a provision to that effect in the extradition treaty. Yet we hold the contrary view, because a country ought not to consider criminals as its citizens, nor should it object to their being made answerable for their offenses.

See Fiore, *Effetti internazionali delle sentenze penali e dell' estradizione*, chap. VII, Turin, Loescher, 1877; and *Droit pénal international et de l'extradition*, part 2, §§ 343, 374, translated by Antoine, Paris, Pedone-Lauriel, 1880.

In Great Britain and the United States, the non-surrender of a citizen is not considered an absolute rule; on the contrary, they admit that the criminal citizen as well as the foreigner, must not escape the jurisdiction of the state where the offense was committed. Accordingly, in certain extradition treaties concluded by Great Britain, and especially in those of 1843 with France and of 1855 with Switzerland, the exception in favor of citizens is not expressed. Nevertheless, as the laws of several states forbid the extradition of citizens, Great Britain and the United States in their most recent extradition treaties have had to admit this restriction. The United States in the convention of June 16, 1852, with Prussia (Malloy's Treaties, p. 1501) stipulated that "none of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

[By article I of the extradition treaty of March 23, 1868, between the United States and Italy the two governments mutually agreed to deliver up all "persons," etc. It was held by the Supreme Court in the celebrated case of *Porter Charlton (Charlton v. Kelly)*, 229 U. S. 447 that "persons" included citizens of the country of asylum. The position of the United States has been that citizens were included among the persons subject to extradition unless expressly excluded. (See the able argument of Secretary of State Blaine in *Foreign Relations*, 1890, pp. 557 *et seq.*) The United States has concluded treaties both with and without the reservation as to citizens. Among those containing no limitation or qualification are the treaty with Great Britain,

August 9, 1842, extended July 12, 1889, Malloy's Treaties, pp. 650 and 740; with Italy, March 23, 1868, *ibid.*, p. 966; with Venezuela, August 27, 1860, *ibid.*, p. 1845; and with Ecuador, June 28, 1872, *ibid.*, p. 436. The Supreme Court in *Charlton v. Kelly*, 229 U. S. 447, 467, decided that "there is no principle of international law by which citizens are excepted out of an agreement to surrender 'persons,' where no such exception is made in the treaty itself." It has come to be the preponderant practice among many nations, however, to refuse to deliver up their citizens. The ablest discussion of the whole question is to be found in J. B. Moore, A treatise on extradition, etc., Boston, 1891, v. I, Ch. V.—Trans.]

#### JUDICIAL ASSISTANCE TO INDIVIDUALS

**593.** No civilized state should refuse the assistance of its courts to foreigners requesting the legal protection of their rights.

All civilized states must admit in principle that the judicial machinery should not be considered an exclusive privilege for the benefit of citizens, but that it is their supreme duty to assure its benefits to all who require it, whether citizens or foreigners.

**594.** Every state, independently of treaties, must secure by law the legal protection of the rights of foreigners, by granting to them, as to citizens, the privilege of using all legal means for the preservation and legal protection of their rights.

**595.** It should be considered contrary to modern international law to compel the foreign plaintiff to furnish in advance security for the costs of the suit in case he is nonsuited.

It is also desirable that every state grant the privilege of suing *in forma pauperis* to destitute foreigners as to its own citizens, when the competent territorial authorities decide that in the particular circumstances of the case the foreigner is entitled to avail himself of that privilege.

The obligation to furnish security for the costs of a suit (*cautio judicatum solvi*) is established in various countries, unless expressly renounced by treaty.

In France, the obligation to furnish such security is provided in article 16 of the Civil Code as amended by the law of March 5, 1895, which reads: "In all cases, the foreign plaintiff, principal or intervenor, shall be obliged to give security for the costs of the litigation and the eventual damages, etc."

In Italy, on the contrary, not only is no security required of the foreigner, but if he fulfills the conditions required to obtain credit from the government for the expenses of the suit, under the law of December 16, 1865, relating to suits of poor persons, he may in that respect enjoy the same privilege as citizens. In fact, article 8 provides that foreigners, if they comply with the requirements of the law, are not excluded from the privilege of suing *in forma pauperis*.

## TITLE XXI

### INTERNATIONAL RESPONSIBILITY OF THE STATE

#### FUNDAMENTAL PRINCIPLES

**596.** Every state which commits an act violative of the right of another state or of private individuals, in its character as a sovereign or by persons entrusted with the exercise of public power, incurs responsibility and must make compensation for the injury inflicted.

Every state having to exercise its rights and all the functions assigned to the sovereign in conformity with the rules of international law, must exercise its sovereign powers without violating them. That is the principle of its general responsibility, which may be incurred in the exercise of legislative, judicial, or executive powers, whenever it does not respect the rules of law governing their exercise. It is our purpose here to examine the particular responsibility which may result from the acts of the government or from those of public officers causing damage and giving rise to the obligation of indemnification and reparation.

**597.** The international responsibility of the state, according to the circumstances of the case, may be either direct or indirect.

It is considered direct whenever it arises as a consequence of acts committed by the government or with its authorization.

It is considered indirect when it arises from acts done by public officers, and even in certain cases by individuals, when the injury may be regarded as inflicted through the fault of the government whose duty to prevent the injury it has negligently failed to accomplish.

**598.** It is incumbent upon every state to decide whether the obligation to repair the damage caused by persons vested with public power should fall upon the state or upon its officers by applying the rules of public administrative law or special municipal laws, or in their absence, the general principles of law, and to determine the damages due to the injured parties, whether alien or national.



## DIRECT RESPONSIBILITY

**599.** When the government of a state, by reason of momentary exigencies and public necessities, takes action which results in an injury to a foreign state or to its citizens, it is bound to repair the damage. The state must be held directly responsible therefor, even though the action of the government may be deemed lawful and justified as such.

In order to understand our rules fully, it must be observed that the legal exercise of sovereign powers may exclude in principle any international responsibility of the state. No one, in effect, may forbid the state from doing whatever public necessities require, and whatever may be considered as within the limits of legality. Therefore, if a government, even in doing what it has a right to do, should be led to injure the property rights of others, it could be held with reason that it ought not to be bound to repair the damage, rejecting any claim of the injured parties to indemnification.

The right of private persons must necessarily be subordinated to that of the collectivity and of the sovereignty which represents it. Therefore, the acts of the sovereign to provide for the social requirements and defense of the rights of the state cannot imply any international responsibility. Yet, in our opinion, it cannot be maintained that the injured person should not receive any indemnity and that the responsibility of the state is not to be admitted as regards indemnification for the injury done to foreigners through the necessity of providing for the protection of the social interests.

Consequently, we believe that the case requires the application by analogy of the general principles which justify expropriation on grounds of public utility, and that a just indemnity should be recognized. (Compare: Fiore, *Questioni di diritto: Sulla responsabilità dello Stato*, pp. 364 et seq.)

Our rule might find application in a case where, during a revolution, civil and military authorities exercise exceptional powers justifiable under international or public municipal law, the exercise of which inflicts a real and material damage upon foreigners, as, for instance, in case of the bombardment of a fortified commercial city.

**600.** The direct responsibility of the state should be admitted whenever the damage can be considered as a consequence of its own act.

We consider as within this rule the maintenance by a state of a system of laws recognized as ineffectual in the repression of injuries to the rights of a friendly state or of its citizens and in the reparation of the resulting damage, provided the defects of the system are serious and notorious and the state has failed promptly to remedy them.

**601.** It is incumbent upon every state in good faith to do everything necessary to ensure the respect of the rules of international

law by private individuals, and to repress acts prejudicial to a foreign state or foreign citizens.

**602.** A government which has honestly and in good faith taken all possible measures to prevent injurious acts, may base upon that fact an allegation of a presumption of non-responsibility on its part.

This presumption should not be overcome by the mere fact that the government has not resorted to measures inconsistent with the political institutions of the state or has been unable to amend its legislation so as to put an end to the resulting inconveniences.

In order to make quite clear the suggestive idea of the foregoing rules relating to the inherent defects in legislation and the measures designed to repair injuries inflicted on other states or foreigners, it must be noted that in order to determine in practice the efficacy of a system of law, it is necessary to ascertain exactly whether or not such system can prevent the injurious acts. When the defects of such legislation are serious and notorious, and especially when the necessity of amending the system is recognized by the states assembled in a Congress (as is the case with respect to Turkey, for instance), one could not reasonably assert, as a bar to responsibility, that the government had resorted to all the means at its disposal. Valid presumptions in the state's favor could be admitted only when the defects and inefficiency of the legislation have not yet been established. It is necessary, therefore, to examine carefully the circumstances of the case to determine whether or not any of the rules proposed should be applied.

**603.** The responsibility of the state cannot be denied for the voluntary commission of acts forbidden by international law whenever damage has thereby been caused to another state or its citizens.

Any act forbidden by international law must be considered unlawful, and when it can be charged against a person exercising public power, it must naturally imply the international responsibility of the state and its obligation to make due reparation. In such case, we must apply the principles governing civil responsibility arising from tortious injuries.

#### INDIRECT RESPONSIBILITY

**604.** The indirect responsibility of the state for the acts of its officers or private individuals who have committed an injury upon others must be admitted whenever the government has failed to take all measures necessary to prevent the injurious acts.

This rule is based on the theory of the Roman jurists in the matter of responsibility, which may also result from the negligent omission (in case of an injury caused by others) to do whatever one was bound to do to prevent

the damage: *qui non facit quod facere debet, videtur facere adversus ea quia non facit* (Leg. 121, Dig. De diversis regulis juris, 50, 17) See Sourdat, *Traité générale de la responsabilité ou de l'action en dommages-intérêts en dehors des contrats*.

**605.** The responsibility of the state for the acts of others may grow out of the negligence or grave indiscretion of the government.

The promptness with which each government is bound to prevent injurious acts forbidden under international law, must be judged according to the contingencies and circumstances of the case, the interests involved, and the degree of possibility of anticipating events which might inflict injury upon a friendly state or its citizens.

It must be admitted in principle that every civilized government is bound to prevent, and that it is at fault when it has not done everything that it should to prevent known violations of international law and injuries to the property rights of foreign states or citizens. Nevertheless, concretely, negligence may be determined by the imminence of the danger and the possibility of anticipating it. Effective responsibility and the obligation to repair a damage can arise only in consequence of a fault imputable to the government and it is only by taking circumstances into account that it is possible to determine the comparative degree of fault.

**606.** A state should be held responsible for voluntary failure of prompt action, when, having had cognizance of the event responsible for the injury, it has not, in order to prevent its effects, employed the means at its disposal or those it could readily obtain from the legislative power.

The extent of the responsibility of the state should be proportionate to the imminence or danger of the injury and the possibility of preventing it.

**607.** The responsibility of the state for culpable omission on the part of the government should be admitted when it has not done everything possible to prevent others from committing an injurious act.

#### RESPONSIBILITY FOR ACTS OF OFFICERS

**608.** The subsidiary responsibility of the state may be admitted for the acts of its public officers who have caused injury to foreign interests, when they have abused or exceeded their authorized powers or when, even in the absence of express authorization of the government, there is tacit connivance on its part.

This responsibility should be recognized when the government:

- a. Having known of, in sufficient time to prevent, the proposed unlawful act of the public officer and, being able to prevent it, has failed to do so;
- b. Having had sufficient time to annul the act of its officer or to prevent its detrimental effects, it failed immediately to annul it or prevent its injurious effects;
- c. Alleging ignorance of the act intended by the officer may, under the circumstances, be considered as in bad faith or culpable;
- d. Having been informed either through official channels, or trustworthy information, of the act committed, it failed to reprimand the officer immediately and take the necessary measures to arrest the detrimental effects of the act and prevent its future recurrence.

See, Oppenheim, *International law*, §§ 157 *et seq.*

**609.** The responsibility of the state arising out of the acts of public officers may be transformed into true direct responsibility whenever it is possible to establish from the circumstances that the officers have acted in obedience to the instructions of the government.

This would undoubtedly be the case when, in the different sections of the country, officers have acted uniformly, thus giving the impression, beyond all possible contradiction, that they must have obeyed official instructions.

**610.** The indirect responsibility of the state for the acts of public officers should be denied when, under municipal law, the injured party may have recourse to the courts effectively to compel the officer to make amends for the injury he has inflicted on foreigners.

The difficulties connected with the responsibility of the state due to the acts of its officers are very complex, not only in international law, but even in public municipal law. It must be admitted in principle that foreigners cannot claim a greater advantage than citizens. For applications of the rules relating to the international responsibility of states, see, Calvo, *Droit internat.*, §§ 1266 *et seq.*; Bonfils, *Manuel de droit international public*, §§ 324-352.

The responsibility of the state arising from acts of its officers must always be considered as based on the presumption of culpability of the government for lack of promptness in doing what it should have done. It may be negligence on the part of the government when it has failed to take the measures required by the most elementary prudence to prevent the injurious act, or to arrest or minimize its effects. It should, moreover, be considered necessary in order to fix responsibility on the state, that the damage shall have been inflicted in the exercise of the officer's duties.

## RESPONSIBILITY OF THE STATE ARISING FROM ACTS OF PRIVATE PERSONS

611. The indirect responsibility of the state arising out of acts of private persons to the injury of foreign states or citizens can be predicated only when the government may be considered as obligated to prevent the acts and has omitted to do what it should have done, or when it may be reasonably presumed that the government has, with evident culpability, allowed private individuals to commit injurious acts which it was its duty to prevent, or when it failed to make use of all the means at its disposal to arrest their effects.

In principle, the indirect responsibility of the state arising from the acts of others cannot be admitted. The basis of this responsibility must always be culpable omission of a duty legally or morally imposed upon it. There must be a general obligation on the part of the government, with respect to an injurious act, to do something on its own part (to exercise surveillance, to prevent, or to punish) in order to raise the presumption of fault by reason of an omission to do something it was bound to do. (Compare: Fiore, *Questioni di diritto*, p. 295, Turin, Unione Tipografico-Editrice, 1904.)

The proposed rule would find its application in time of war with regard to a state which had declared its neutrality. Neutrality not only implies the obligation of the government to refrain from any direct assistance, but also that of preventing private persons from giving assistance to the belligerents and organizing it on the territory of the state which has declared its neutrality. The indirect responsibility of the state should be conceded when the government has negligently allowed private individuals to organize on its territory means of assistance of a nature hostile and prejudicial to one of the belligerents.

These are the principles on which was based the award of the Geneva arbitral tribunal in the celebrated controversy between Great Britain and the United States arising out of the *Alabama* claims during the Civil War.

612. In order to concede or deny the responsibility of the state for acts of private persons, it is necessary to adduce or disprove evidence of fault on the part of the government.

It rests with the claimant to establish by sufficient evidence the presumption of culpability of the government, so as to charge it with responsibility for injuries inflicted by others.

It is the right of the government, when the presumption of culpability on its part has been raised, to furnish complete proof that it has acted promptly and done all it possibly could to prohibit and prevent the injurious act or arrest its effects.

It would surely not be sufficient to assert that the government should be presumed to be culpable; it would be necessary to prove that it was bound to take precautions to prevent the injurious act, and that it has neglected to do

so. The burden of proof must rest upon the claimant. After the presumption of fault of the government is thus established, it is clear that it cannot deny its responsibility, except by proving that it was guilty of no omission of duty implying fault.

**613.** Whenever the responsibility of the state for injuries to foreign states or to foreigners has been established, and the obligation of reparation for the injuries has been admitted, no difference should be made whether the injured party is a citizen or a foreigner. Even when it is necessary to concede the application of the principles of equity and rules of public administration for the reparation of the injury, these principles ought to be applied to foreigners and to citizens alike.

**614.** As to the indemnities due for damage caused during ordinary or civil war, the rules relating to the exercise of the rights of war should be applied, in so far as they modify the rules previously established.

**615.** International disputes growing out of the responsibility of the state for the reparation of injuries to property suffered by foreign states and private persons must be submitted to international commissions of inquiry and to arbitral courts.

## TITLE XXII

### DUTIES OF HUMANITY

**616.** Every civilized state must always act in conformity with the principles of moral law and comply with the duties of humanity.

Every state should refrain from actions which may be contrary to the well-being of other states or might injure them. It should also co-operate, without detriment to its national interests, in the promotion of general prosperity.

We may apply, even in international relations, the principle formulated by the Roman jurists: *Quod tibi non nocet, alteri vero prodest, non est denegandum.*

**617.** No state may compel another state to observe the duties of humanity, nor may a state consider the refusal of another as unfriendly and hostile.

Yet, when the act of another state may be considered as contrary to the principles of moral law or to those of humanity and of the *comitas gentium*, and inflicts a real injury upon other states, it may call for a collective remonstrance for the protection of common interests.

The precept *honeste vivere* commends itself to states as well as to all persons wishing to act in conformity with the principles of natural justice. This precept requires no demonstration and no power of dialectics could augment its clearness and force.

We must admit, therefore, that the performance of moral duties must be left to the unrestricted appreciation of each government. We believe, however, that an arbitrary and persistent refusal cannot be justified in any case. Thus, for instance, it cannot be admitted that a state may arbitrarily refuse to receive a scientific mission which intends to study a contagious disease, determining its cause, development and propagation. Such unjustified refusal may be a serious ground for complaints by other states.

**618.** It should be considered a moral duty imposed on every civilized state to do everything necessary to prevent public calamities.

For that purpose, states should:

(a) Encourage scientific research into the causes of certain

contagious diseases, pursued with the object of preventing their propagation;

(b) Co-operate to prevent the spread of epidemics, by immediately advising foreign governments of the first appearance on their territory of cases of contagious disease (plague, cholera, etc.); by making known the region where the disease has appeared, its gravity and the measures adopted to arrest its spreading;

(c) Prescribe without delay the sanitary measures designed to prevent the spread of contagious diseases;

(d) Promote the meeting of sanitary conferences and encourage discussions for the study of questions of public health in their relations with effective international co-operation;

(e) Co-operate to assist foreigners employed in industry, in case of accident, destitution or sickness, and to send them to their own country if without means or the assistance of a consul of their country.

At the sanitary conference of Vienna of August 1, 1874, the wish was expressed that a permanent international commission be created for the study of contagious diseases and the prescription of measures designed to prevent them from spreading.

This wish was realized in the convention signed at Vienna, March 19, 1897, in which the necessary measures to prevent the introduction of bubonic plague in Europe were established by the following countries: Germany, Austria-Hungary, Belgium, Spain, United States, France, Great Britain, Greece, Italy, Luxemburg, Montenegro, the Netherlands, Persia, Rumania, Russia, Switzerland and Turkey.

Finally, on December 13, 1903, with a view to preventing the spreading of plague and cholera, there was concluded at Paris an international sanitary convention between Germany, Austria-Hungary, Belgium, Brazil, Egypt, Spain, the United States, France, Great Britain, Greece, Italy, Luxemburg, Montenegro, the Netherlands, Persia, Portugal, Rumania, Russia and Switzerland.



## TITLE XXIII

### INTERNATIONAL RIGHTS AND DUTIES OF MAN

#### GENERAL RULE

**619.** Whatever his race, degree of culture and color may be, man, so long as he lives in political association, even if he has a nomadic existence, does not lose the rights of human personality which are his according to international law. He may everywhere request the respect, enjoyment and exercise of these rights, on condition of subjecting himself to the authority of territorial laws and of observing the local laws.

Compare rules 1-66 *et seq.*

#### INVIOABILITY OF THE PERSON

**620.** Every one is entitled to personal inviolability as a man and any injury to his person and his liberty must be considered contrary to international law, which protects man, even when not a member of a political body organized as a state.

**621.** The liberty of man must be respected as his personal right, independently of treaties, and must be protected and guaranteed by all the legal and judicial measures employed in behalf of citizens.

**622.** The right of personal liberty and inviolability cannot be denied to any man, whatever his race or color.

#### PERSONAL RIGHTS OF NEGROES

**623.** Any state which denies to negroes the rights of human personality and permits them to be bought and sold, as it does property, violates international law.

**624.** The traffic in negroes, under whatever form it may be

carried on, and even with the authorization and tolerance of the state where it is conducted, must be considered as an infringement of the rights of human personality and declared absolutely unlawful and contrary to international law.

**625.** Every civilized state must do everything necessary to guarantee the personal inviolability of negroes, use all the means at its disposal to put an end to the shameful traffic in them and punish those who carry it on or take part in it either directly or indirectly.

The Italian law severely punishes the slave trade by penalties providing for the punishment of maritime offenses in Chapter V of the Merchant Marine Code. Article 337 provides that the offense of slave trading shall be considered as committed whenever a slave shall be treated as such on board a national vessel. The Code also provides for the punishment of attempts at slave trading, which is considered as accomplished when a vessel fitted out for the transport of slaves has been caught before the act of slave trading has taken place. (Arts. 340-341.)

**626.** Any slave, although bought where the slave trade is declared lawful, must be considered free and inviolable in his person as soon as he enters the territory of a civilized state, which is bound to protect his liberty and the inviolability of his person.

This rule was sanctioned in the anti-slave Act of July 2, 1890, article 7 of which reads as follows: "Every fugitive slave who, or the continent, claims the protection of the signatory Powers, must receive it and shall be received in the camps and stations officially established by the Powers or on board public vessels navigating in the lakes and rivers. Stations and private vessels can exercise the right of asylum only with the prior consent of the state."

**627.** All civilized states should adopt the measures necessary to put an end to the slave trade in the regions where it still exists, considering as unlawful not only the traffic itself, but also all operations on land and sea designed to maintain and exercise it.

They must, moreover, use all their influence to compel barbarian sovereigns and uncivilized peoples who permit the slave trade, to put an end to it.

This rule is sanctioned by article 9 of the treaty of Berlin of February 26, 1885, and forms the "common" law of the following states: Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Luxemburg, Norway, Portugal, Russia, Spain, the United States, Sweden, and Turkey. These countries have adopted the following declaration relating to the slave trade: "Article 9: In conformity with the principles of the law of nations as recognised by the signatory Powers, the slave trade as well as all incidental operations on land and sea being prohibited, the Powers which now or hereafter exercise rights of sovereignty or influence in

the territories forming the conventional Congo basin declare that these territories shall not serve either as a market or as a channel of transit for the trade in slaves of any race. Each of the Powers undertakes to employ all the means within its power to put an end to the trade and punish those who engage in it."

**628.** The rules adopted in the General Act signed at Brussels on July 2, 1890, for the suppression of the slave trade must be considered as the expression of the principles demanded by civilization to protect the individual liberty and inviolability of the human person and must be deemed binding on all civilized states.

The general anti-slave act, concluded at Brussels July 2, 1890, was signed by Austria-Hungary, Belgium, Congo, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Persia, Portugal, Russia, Spain, the United States, Sweden and Norway, Turkey and Zanzibar. Under this treaty the signatory powers adopted the most effective means of suppressing the slave trade in the maritime zones where it still existed. Besides the means designed to prevent the transportation of slaves, e. g., the reciprocal right of surveillance, search and seizure of the ships engaged in transporting slaves (art. 22), the signatory powers authorized more efficient means of suppressing the slave trade in the places of origin in the interior of Africa (art. 1) and watching convoys along the land roads used by slave dealers (arts. 15 and 19). They prescribed in like manner the best means of protecting liberated slaves and founded places of refuge for the purpose of encouraging the liberation of slaves (art. 86).

#### INVIOABILITY OF PROPERTY

**629.** Private property must be considered inviolate under international law, no matter what form it may assume.

**630.** Every man may employ his faculties with regard to property, wherever located, and acquire it under the conditions established and determined by the *lex rei sitæ*.

**631.** Literary, artistic and industrial property should likewise be considered inviolate.

We do not admit that the fruits of the intellect should be considered as property. We do not find therein the requisites and characteristics of things constituting the object of property. However, this is not the place to expound our views, and we shall merely say that we have adopted the usual terminology, without undertaking to guarantee its accuracy.

**632.** The right of the author of a product of the intellect to obtain the legal protection of his right, whatever it may be, under the conditions determined by law, must be considered as founded on the respect due to the international rights of man in the noblest manifestations of his activity. While an international right of man apart from treaty, it is incumbent on states to assure legal

protection for the rights in literary and artistic property by means of treaties.

The foregoing rules seek to respect the right of an author over his production and the inviolability of such right from a legal point of view. It cannot be considered as a gracious concession of a prince, nor as a privilege based on treaties, nor as a privilege assured exclusively to citizens. It is the most sacred right of the human personality, because it is the fruit of personal activity which has manifested itself and been developed through work. It must, therefore, be considered as a right of man and as such have the character of an international right for the good reason that the rights of the human personality cannot be restricted within the territorial limits of any one country.

**633.** Save for the right of every state to subject the protection of literary, artistic and industrial property to certain legal conditions previously determined, it must be conceded that a failure to assure equal treatment to foreigners and citizens is a violation of international law on the part of the state.

**634.** It is contrary to modern international law for a state to forbid to foreigners the acquisition of real or personal property under the same legal conditions as citizens, or to deny to foreigners the enjoyment of the private rights embraced in the right of property. The state may reserve to citizens exclusively, on grounds of public policy or social welfare, certain rights relating to particular matters. The state may also grant the enjoyment of certain rights connected with real property to citizens alone, by reason of the special nature of the rights and their connection with public law and public policy.

**635.** Yet when by the laws of a country foreigners or foreign states are prohibited from acquiring real property by inheritance, provided the right to inherit is recognized, the territorial state cannot confiscate decedent's estates to its own profit; it can only compel the heir or successor to the estate to alienate the property, with the right to receive and take away the purchase price.

This rule was developed at greater length in our legal opinion on the Zappa succession in Rumania. Under the legislation of that country, foreigners being forbidden to acquire the real property bequeathed by the deceased to Greece the question arose as to whether Rumania could confiscate the property.

See Fiore, *Successione Zappa, Controversia tra la Grecia e la Romania*. As regards legacies to the Pope and to the Church, see rule 712.

**636.** Private property, whoever its owner, must be held inviolate, even on the high seas in time of war, save when the rights of ownership are subject to just limitations under rules of inter-

national law governing the rights of belligerents and private persons in time of war.

**637.** Civilized states must consider as reciprocally binding upon each other all legal rules designed for the protection of property in all its forms.

#### RIGHT OF FREE MIGRATION

**638.** Everyone, whether a citizen of a state or belonging to an uncivilized tribe or living a nomadic existence, has the right freely to enter the territory of any state open to trade, observing the laws of police and public security applicable to foreigners, and he may sojourn there, provided he complies with the local laws.

This rule seeks to do away with the necessity of the passport imposed upon foreigners desiring to enter the territory of a state. The passport may always be useful in ascertaining the nationality of the holder and furnishing *prima facie* evidence thereof. But it cannot be maintained that the right to enter a state is based on the passport, and that the absence of that document constitutes sufficient grounds to deny admission to a state open to trade.

**639.** No state professing to respect the principles of modern international law may, through exaggerated measures of precaution, hinder or impede the entrance of foreigners into its territory, nor oppose their sojourning without reasonable grounds based on public order or policy.

Compare rules 261 *et seq.*

**640.** A state always has the right to regulate by special laws the entrance of foreigners into its territory and to determine the necessary conditions for the practice of professions, arts and trades, in harmony with the social, economic and political interests of the country.

**641.** A foreigner who has entered a state may depart without previous authorization of the government unless, under the territorial laws, he must be considered as temporarily deprived of his personal liberty.

**642.** Every foreigner, independently of treaties, must be protected by the laws of the state where he resides in the enjoyment and exercise of his civil rights; he must be allowed to undertake civil acts, without being considered, as a foreigner, outside the pale of "common" law.

## RIGHT TO EMIGRATE

**643.** The right to emigrate is one of the personal rights of man, and must be considered as a development of individual freedom.

No state may prevent its citizens freely and without obstacle to leave its territory to go abroad in order to develop their activity with the hope of larger rewards. The emigrant may, however, be required to have fulfilled his military obligations for the period legally imposed upon all citizens.

**644.** Emigration does not break the bond between the emigrant and his native country. Nevertheless, the emigrant is bound to obey the laws of the state where he resides, even as regards the exercise of rights accorded him by the laws of his native country.

**645.** The government of the state of which the emigrant is a citizen may use any lawful means to maintain the bond which connects him with his country, by encouraging the preservation of his national sentiments, promoting his attachment to the institutions of his native country and protecting him against vexatious measures of local governments.

It must be observed, however, that in principle this must be done without violating or disregarding the rights of the territorial state and without effecting a sort of disguised invasion or intervention.

A well-organized emigration may become an important factor of the economic and commercial prosperity of states and an efficient instrument of the civilization of barbarian nations. Instead of opposing it, therefore, states should encourage emigration by considering it as a measure well adapted to meet the pressing necessity of individuals to earn a livelihood through profitable labor, and to bring about a more equitable relation between the lands of the earth and the men who must people and work it. Emigration may admirably contribute to the spread of civilization, by permitting barbarian peoples peacefully to benefit by the more advanced culture and energy of more industrious workers and more enlightened commerce, so as gradually to attain the same level of culture and civilization.

**646.** It is the duty of the territorial state to regulate immigration by limiting it, according to circumstances, in order to prevent the moral and economic disturbances likely to arise from an excessive immigration and by reconciling the practice of professions, arts and trades on the part of immigrants with the moral and economic interests of citizens and the political interests of the state.

**647.** It is incumbent on the states of which the emigrants are

citizens, to protect them against the traps of speculators and emigration agencies and to prevent emigration from being fomented by fallacious promises of exaggerated profit.

To that end it should:

- a. Regulate emigration by special laws;
- b. Subject agencies to the authorization of the government and supervise the operations of securing employment, embarkation and transportation effected by them;
- c. Subject to legislative rules the relations of emigration agents to emigrants;
- d. Take into consideration the claims of emigrants and compel, by criminal penalties, the observance of the obligations imposed on emigration agents;
- e. Do everything that may be required to modify the political or social conditions which may influence emigration.

#### FREEDOM OF NAVIGATION AND COMMERCE

**648.** Everyone has the right to navigate freely on the high seas and in the waters included within the territorial domain of any state, on condition of observing the rules governing navigation; he may invoke the application of the international laws which protect persons and property engaged in navigation.

See Book III for the rules of navigation.

**649.** Anyone may enter territorial waters and invoke the protection of international law in so far as it governs the peaceful use of such waters, on condition of complying with the laws and regulations of the territorial state.

He may freely use all means of communication for the free exercise of his activities, provided he observes the local laws and regulations.

The purpose of this rule is to establish the fact that the right of navigation over the territorial waters of a state must not be considered as based on treaties and reserved only for the citizens of states which have concluded treaties. No sovereign who does not wish to violate the principles of international law, may arbitrarily deny the peaceful use of channels of communication by land and sea to an individual who is not a citizen of a state with which there exists a treaty granting such right under reciprocity. We believe, therefore, that the peaceful use of means of communication must be considered as an inherent right of man, whenever the individual who seeks to avail himself of it complies with the territorial laws governing the subject.

## RIGHT OF FREEDOM OF CONSCIENCE

**650.** Freedom of religious worship must be protected by international law and considered as one of the international rights of man.

Everyone may retain or change his religious faith with complete freedom and does not have to account to anyone for his decision nor for his refusal to join any particular faith.

**651.** Everyone is entitled freely to practise his religion, provided that it is not prohibited by the territorial law, or does not happen to be subsequently prohibited for reasons of public policy or order.

**652.** Religious persecution should be considered as an infringement of the right of freedom of conscience and should be deemed a grave violation of international law on the part of the state, if it has authorized it and has failed to do everything in its power to prevent it.

**653.** It should be considered as a grave infringement of modern international law to condition the enjoyment of civil rights upon religious faith, or to bring into play any kind of influence whatsoever to compel foreigners to change their religious faith and especially to expose them to persecution or annoyance for refusing to change it.

In like manner, it must be held unlawful to subject foreigners to examinations and inquisitorial measures in order to ascertain their religious faith.

## RIGHT OF CITIZENSHIP

**654.** Every person legally capable of exercising civil rights may freely choose the state to which he wishes to belong and when he has fulfilled all the conditions fixed by the legislature, he may demand recognition of his citizenship and the enjoyment of all the rights and privileges granted by law to citizens.

**655.** The title of citizen may be given to any person who, while not legally capable of choosing the state to which he wishes to belong, nevertheless fulfils the conditions fixed by law to be deemed a citizen.

The legislatures of the different countries assign the title of citizen to persons who are not capable of expressing their own will, by taking into account their



natural tendencies predetermined by blood ties and family relations. It is justly presumed that the child should desire to follow the legal status of his father. Accordingly, the laws provide that the child acquires at his birth the citizenship of the father and preserves it, first during his minority and then after his majority so long as he does not manifest his desire to acquire another citizenship.

**656.** Every state may determine the persons who are to be considered citizens and foreigners, and the rules for the determination of these matters must be considered within the sphere of the state's autonomy and independence.

**657.** We must admit the anomalous condition by which under the municipal law of two different states an individual may be deemed a citizen of both states, thus possessing dual citizenship.

It often happens that, in consequence of the legislative autonomy of every state, a person is endowed with dual citizenship. According to article 8 of the French Civil Code, as amended by the law of July 22, 1893, any person born in France of foreign parents one of whom was born in France, is considered French, provided he does not renounce his French citizenship within a year of his majority, determined in conformity with French law. On the other hand, according to article 4 of the Italian Civil Code, a child born in France of an Italian father is deemed an Italian, although he meets the conditions provided for in article 8 of the French Civil Code. It remains to be said that national courts must decide questions of citizenship in accordance with national law, disregarding the fact that the same person possesses also a dual nationality.

The same thing happens under laws granting citizenship to persons born within the state of foreign parents. This is the case in the Argentine Republic by the law of October 1, 1869; in Bolivia, according to the constitution of February 15, 1878; in Ecuador, according to the constitution of August 11, 1869; in Guatemala, under the constitution of 1851, revised in 1859; in Mexico, in conformity with articles 1 and 2 of the law of May 28, 1886; as well as in a great many other countries. Now, under article 4 of the Italian Civil Code, children born in those countries of Italian fathers, are declared to be Italian, so that the fact that they are citizens of two states is the unavoidable consequence of the conflict of municipal legislation relating to citizenship. This anomalous condition fortifies the opinion of jurists who demand an international agreement to prevent these inconveniences. [See Lelong's case and the views of the Department of State on dual nationality in July, 1915, Supplement to *American Journal of International Law*, pp. 369-375. See also Borchard, *Diplomatic protection of citizens abroad* (New York, 1915), §§ 253-261.—Transl.]

Compare: Court of Cassation of Florence, February 3, 1875, Vincentini case. (*Bettini*, XXXI, I, 1, 429.)

#### CHANGE OF CITIZENSHIP

**658.** Any person legally competent under his national law may renounce the citizenship of that country to acquire another. This

is one of the personal rights of man, which cannot be conditioned upon the previous authorization of the state of which he is actually a citizen.

**659.** The loss of nationality of origin may be effected by express or tacit renunciation; it cannot, however, become effective until a new citizenship in another state has been acquired.

**660.** Express or tacit renunciation is valid when it takes place in accordance with the forms determined by law.

Tacit renunciation of the nationality of origin may be accomplished by voluntarily doing something which, under the national law of a person, is incompatible with the retention of citizenship.

Citizenship must be considered as a great benefit to the person who possesses it. Consequently, it must be presumed that every one, so long as he has not renounced it, desires to retain his citizenship.

In order to admit tacit renunciation, two conditions are required: 1st, that the act from which the inference is drawn shall have been voluntary; 2d, that the act be expressly indicated in the law as sufficient in itself to cause a loss of citizenship. This is the only way in which the respect of the right of free attachment to the state, one of the personal rights of man, may be assured.

#### UNLAWFUL CHANGE OF CITIZENSHIP

**661.** Renunciation of citizenship should not be considered as valid, if effected fraudulently and in bad faith. This would be the case if citizenship is renounced merely with a view to escape the authority and penalty of the law in order to accomplish a prohibited act or to violate a right acquired by a third person according to his national law.

**662.** Renunciation of citizenship may likewise be considered to have been effected in bad faith, when it appears from the circumstances that the person, without any permanent intention of abandoning his native country, actually and finally, has temporarily changed his personal statute for the sole purpose of thus exercising certain rights which his national law denies him. This intention may be inferred from the fact that he has maintained the bonds which connected him with his country, by manifesting his intention to reacquire anew his renounced citizenship.

In order properly to explain the idea developed in the foregoing rules, we must recall that in admitting the right of every one to select freely the state of his choice, we stated that it cannot be considered a fraud on the law to change citizenship in order to acquire the enjoyment of rights more extensive than those granted by the law of his country.

This being his personal right, it cannot be said that a person exercises that

right in bad faith and unlawfully when by so doing he has defeated the expectations of others: *qui suo jure utitur nemini injuriam facit*. This would be the case, for example, of a person who, in order to dispose more freely of his property, renounces his present citizenship so as to have greater liberty to bequeath by will. Such action could not be said to be fraudulent because the expectations of his legal successors may have been defeated.

Since the right to succeed becomes effective at the time of death only, the order and measure of rights of succession can be determined under the law in force only at the time of the decedent's death. Considering that the right to change citizenship is essentially personal, one cannot allege the invalidity of the new citizenship legally acquired, on the ground of the possible injury to the heirs, for the latter cannot profit by any right of succession during the life of the decedent; for expectations never constitute vested rights.

Invalidity because of fraud upon the law can be asserted in the case of a person, incompetent to change his citizenship and to avoid the effect of the law which governs the exercise of his rights, who seeks to acquire the citizenship of another state in order to exercise rights denied to him by the law of his country; or when a person changes his citizenship to avoid the obligation of respecting rights acquired by third persons under the law. (This would be the case of a husband who, in order to deprive his wife of the right to demand the return of her dowry, becomes naturalized in a country where this right is not admitted against the husband).

The same thing may be said where, under the circumstances, citizenship could not be considered as real and effective, but as essentially void by reason of the fact that its main object is to withdraw the person acquiring it from the authority of his national law; as, for example, when an Italian, in order to escape the authority of the Italian law forbidding divorce becomes naturalized *pro forma* in a foreign country so as to secure a divorce with the intention of subsequently recovering his Italian citizenship in order to marry another woman in Italy. Owing to the fact that, while he renounces his Italian citizenship, he still retains Italy as the main center of his affairs and interests, and that, all things considered, it appears that his renunciation of Italian citizenship was neither genuine or real, but was effected merely with a view to avoid the imperative commands of his national law, the fraud upon the law is clear.

663. It cannot be considered fraudulent to renounce one's citizenship in order to change one's personal statute so as to acquire more extended rights, even though this renunciation may be prejudicial to the expectations of third parties.

664. Change of citizenship can have no retroactive effects. Therefore, the acquisition of foreign citizenship can never relieve a person from fulfilling obligations imposed on citizens, such as the civil obligations incurred before the loss of citizenship, military service, and the respect of the rights acquired by third parties, etc.

#### NECESSITY OF A COMMON LAW RELATING TO CITIZENSHIP

665. It is incumbent on states, in order to avoid difficulties due to questions of citizenship and to prevent the multiplicity or ab-

sence of such citizenship, to adopt in common accord uniform fundamental rules designed to reconcile both their legislative autonomy and the individual's liberty to choose his home state, the purpose being one of reciprocal utility in determining exactly the citizenship of every one and bringing the municipal law into harmony with the fundamental rules which ought to constitute the "common" law of civilized states in the matter of citizenship.

666. The legislative autonomy of the sovereignty of every state with respect to citizenship should consist in fixing the conditions necessary to acquire, renounce, lose and reacquire citizenship, without, however, violating the fundamental rules adopted by common agreement.

It is well to note that citizenship is the basis of political, private and international rights, for political rights, public and civil, which under municipal law are granted to citizens only, are founded on citizenship. Private rights which are determined by the personal statute also depend on citizenship. The same is true of international rights, which according to treaties are accorded to the respective citizens of the contracting parties. It thus follows that in order to prevent conflicts which may arise whenever the title of a certain person to certain rights comes into question, it is necessary to establish beyond controversy the exact citizenship of the person. At present, since each state regulates citizenship by virtue of its own legislative autonomy, without regard to the laws of other states, it may happen that a person is at the same time a citizen of two states or of none at all. This lack of legislative harmony results unavoidably in uncertainty in the status of persons and their rights and in unfortunate conflicts with respect to the powers of a state as regards individuals invested with the legal status of dual nationality.

#### RATIONAL RULES ON THE ATTRIBUTES OF CITIZENSHIP

667. States must regulate the acquisition and loss of citizenship, admitting as a principle that no one may be without citizenship or be a citizen of two states at the same time.

668. The imposition of citizenship upon individuals without their express or tacit consent must be considered a violation of the personal right of man freely to attach himself to a given state.

Illustrations of this are:

(a) A provision to the effect that persons born in the territory of the state of foreign parents shall not have any other citizenship.

(b) A provision declaring as citizens persons residing in the state in order to carry on their trade, although they manifest no intention of renouncing their citizenship and of acquiring that of the state of residence.

(c) The grant of citizenship in the state to an individual marrying a native woman.

[This is the law of Brazil. See Rodrigo Octavio in 6 Rev. de l'Inst. de Droit Comp., 307—Transl.]

(d) The grant of citizenship in the state, the presumption of consent being based on silence or a negative act when nothing positive has been done implying tacit consent to acquire citizenship.

[On imposition of citizenship by the Constitution of Brazil and statutes of other Latin-American countries see Borchard, *Diplomatic protection of citizens abroad*, § 232—Transl.]

(e) Any other form of imposing citizenship without express manifestation of the will of the individual to that effect, or without any rational presumption of consent on the part of a person not in a position to manifest it, based on a proper interpretation of the natural sentiments of the individual.

(f) The grant of collective citizenship to all the inhabitants of a country conquered or voluntarily ceded, without properly guaranteeing them liberty of election to retain their citizenship or making the right of election illusory and onerous.

The right freely to become a member of a state, as an essentially personal right of man, must be respected and protected. Therefore, citizenship cannot be imposed against the will of the individual and a change of nationality must always follow a free manifestation of the will. Naturalization, accordingly, can only be recognized when it is requested and obtained by virtue of a voluntary act of the individual. Imposed citizenship cannot be considered as an acquired citizenship. Individual initiative is always required.

669. The citizenship of the father shall be assigned to his legitimate child, wherever born, the child retaining that citizenship unless, having full capacity, he requests and obtains citizenship in another state.

670. The citizenship of an illegitimate child follows the citizenship of the father, if the latter has recognized him, or that of the mother if she alone has recognized it, provided that by the law the father's country such effect follows recognition.

671. An individual born of unknown parents within the territory of a state is a citizen of that state.

When, however, an individual registered as a citizen by reason of birth of unknown parents is subsequently recognized by his foreign father or by both a father and a mother of different na-

nationalities he shall follow his father's status. If recognized by the mother alone he shall follow her citizenship.

[As to the effect of illegitimacy on citizenship in U. S. see Borchard, *Diplomatic protection of citizens abroad*, § 273—Transl.]

**672.** A woman marrying a foreigner loses her nationality and by reason of her marriage acquires that of her husband. She has the right to retain the nationality so acquired until the dissolution of the marriage, and cannot acquire another, even after a legal separation from her husband.

[See *MacKenzie v. Hare*, 239 U. S. 299—Transl.]

**673.** The wife and minor children of a man who has acquired a foreign nationality and thereby lost his original nationality retain their original nationality.

The wife shall be deemed a citizen of the husband's new country only when she has freely and expressly declared her desire to follow his status. The minor child shall retain his nationality unless, having become of age under the laws of his native country, he declares (as provided by that law) his desire to follow the status of his father.

[As to the effect of naturalization of husband and father on a married woman and minor child under the law of the United States, see Borchard, *Diplomatic protection of citizens abroad*, §§ 264, 272 and cases there cited,—Transl.]

**674.** There is a legal presumption that every person retains his nationality of origin so long as it is not proved, under the law of his country of origin, that he has voluntarily lost his original citizenship and, under the law of the foreign country, that he has duly become naturalized as a citizen.

The reasons upon which it seems to us the foregoing rules are founded are developed in our works, namely: Fiore, *Diritto internazionale privato*, 4th ed. (Turin, Unione Tip.-Editrice, 1902, v. 1, *Leggi civili, Parte speciale*, chap. III.) See also the French translation of Ch. Antoine and the Spanish translation of Garcia Moreno; Fiore, *Sulle disposizioni generali dell'applicazione e interpretazione delle leggi* (Naples, Marghieri, 1890), v. II, chap. XI; *Della cittadinanza in rapporto alla legge personale*.

The rules concerning minor children and married women are designed to prevent the citizenship acquired by them by reason of birth or marriage from being altered by the will of the husband or father and to establish the principle that the *status civilis* is a personal right of every one, of which he or she alone has the right to dispose, provided he or she has legal capacity.

On questions of citizenship under the Italian civil law, see: Fiore, *Diritto*

*civile italiano; Della condizione giuridica delle persone* (Naples, Marghieri, 1889), title I: *Della cittadinanza*.

#### NATURALIZATION AND ITS EFFECTS

675. Naturalization voluntarily and lawfully obtained should entail *ipso jure ipsoque facto* the loss of the prior citizenship and the acquisition of the new. A change of the personal statute begins from the time naturalization has been legally perfected under the law of the naturalizing country.

676. The change of personal statute can have no retroactive effect; hence the respective authority of the law of the original and of the new country should be determined in accordance with the principles of transitory law.

677. A concession of the power to exercise civil rights on an equality with citizens of the country, granted by act of the Executive, is not the equivalent of naturalization. It is always necessary, in order to admit a change of the personal statute, that the foreigner be assimilated to the citizen with respect to the enjoyment of civil rights and, at least partially, of political rights accorded to citizens.

Under the laws of certain countries in which foreigners are not treated like citizens with respect to the enjoyment of civil rights, these rights are granted them by act of the executive. By article 13 of the French Civil Code, as amended by the law of June 26, 1889, the enjoyment of civil rights is granted to the foreigner who is authorized by decree to establish his residence in France. Undoubtedly, this concession does not produce the effects of naturalization. It is a temporary one, and is good for five years only, after which time it becomes void if the foreigner has not applied for and obtained his naturalization. It is evident that the decree above mentioned cannot produce a change of personal statute, for the foreigner who obtains the decree in his favor is, during the five years, in the same legal position as in Italy, where, by virtue of article 3 of the Civil Code the foreigner is granted the enjoyment of civil rights on the same terms as the citizen. So, also, in England, the enjoyment of civil rights or of some of them only (as, for instance, the right to acquire real estate, to inherit and to dispose of property by will) was granted by act of denization, the importance of which has decreased greatly since the law of 1870, when foreigners were granted the exercise and enjoyment of property rights. The denizen, according to the English law, is unquestionably not in the position of a person who has obtained his naturalization and it cannot be said, therefore, that his personal statute is changed. The same is true with respect to other countries where, by law, the foreigner may be granted the *indigénat* as well as the enjoyment of certain special rights, such, for instance, as that of casting a vote in municipal elections.

Compare: Fiore, *Diritto internazionale privato*, 5th ed., 1903, v. I, §§ 379 *et seq.*

**678.** Naturalization may result from the voluntary or forced cession of a part of the territory of a state to another state annexing it. This is called collective naturalization.

**679.** Collective naturalization, like individual naturalization, may become operative from the time the annexation has become effective and real, and from the time the conditions stipulated in the treaty of cession with regard to the retention and loss of original nationality have been fulfilled.

Even in case of collective naturalization by reason of annexation, we must respect the right of the individual to attach himself freely either to the annexing state or to the ceding one, and of persons born in the ceded territory not to be forced against their express or tacit desire, to change their nationality. It is, therefore, essential to grant the inhabitants of the ceded territory the liberty of electing to retain their original nationality by fixing a reasonable time limit for exercising the right of election.

Compare: Fiore, *op. cit.*, §§ 382 *et seq.*

#### DOMICIL IN ITS RELATION TO CITIZENSHIP

**680.** Domicil cannot be considered sufficient in itself to attribute citizenship to the person domiciled, especially when the requirements of business have caused his residence. It should, however, be considered in accord with reciprocal interests to admit in principle that one who establishes his civil domicil in a foreign country without expressly declaring that he wishes to reserve his rights of citizenship in his native country, should at the end of a certain period (five or ten years at least) be held to be a citizen of the state of his residence.

While the relations arising out of domicil and those arising from nationality are of a different nature, yet since the actual population of a country is made up of all the persons permanently resident and having there the centre of their business and interests and since, therefore, domicil establishes certain bonds between domiciled residents and the sovereign of the state, it must be admitted that when this condition has subsisted sufficiently long to warrant the presumption of a desire to join the local population and abandon the country of origin by manifesting an intention not to return, these circumstances may be equivalent to a tacit renunciation of native citizenship and a tacit adoption of the citizenship of the country of residence.

[This principle has not been adopted by Anglo-American law, although the Department of State has adopted rules by which a loss of American protection follows long-continued residence abroad under certain circumstances; and by the Act of March 2, 1907, in the case of naturalized citizens, residence of two years in the native country or of five years in any other country, results in a presumption of loss of American citizenship. See Borchard, *Diplomatic protection of citizens abroad*, §§ 328-330—Transl.]



Such effect should not be attributed to commercial domicile established for business purposes, but it would be reasonable to recognize it in case of civil residence.

See, Fiore, *Diritto internazionale privato*, 2d ed., 1874, *Appendix*, p. 552, and 5th ed., v. I, § 58.

Under the law of the German Empire of June 1, 1870, art. 21, Germans leaving the Empire and residing abroad for ten years without interruption lose their citizenship. [This provision has been repealed by the German law of July 22, 1913—*Transl.*]

This principle is also recognized in the treaty of February 22, 1868, between the North German Union and the United States, article 1 of which reads as follows: "Citizens of the North German Confederation who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.

"Reciprocally, citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within North Germany five years, shall be held by the United States to be North German citizens, and shall be treated as such. The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization. . . ." [Malloy, *Treaties*, etc., 1910, v. II, p. 1298.]

**681.** Domicil and even long-continued sojourn in a country with the intention of remaining may be deemed sufficient to warrant considering the domiciled person as a citizen, provided he belongs to no particular state and is in the position of a man without a country (*Heimathlos*).

The civil status of every person and the enjoyment of private rights must be determined in accordance with the law of the country to which he belongs. International law must eliminate persons without a country, the *heimathlosen*. When a person cannot invoke the protection of his national law, it is reasonable to consider him, even with respect to his civil status, as governed by the law of the state of domicil. [In Anglo-American law, the law of the domicil and not of nationality controls civil status, for nearly all purposes—*Transl.*]

#### PROOF OF CITIZENSHIP

**682.** Whoever claims citizenship in a state must prove it by the law of that state.

**683.** The proof of citizenship should be judged by the courts in accordance with the rules enacted by the legislature for the determination of citizenship.

**684.** The mere fact that a person establishes that he has acquired citizenship abroad cannot be sufficient to prove the loss of his original nationality before the courts of his original state;

he must prove that the loss of citizenship was effected in accordance with the laws of that state.

The purpose of this rule is to eliminate the inconveniences likely to arise when a person who, incapable under his national law of acquiring foreign citizenship, acquires it under the foreign law and afterwards claims in his country of origin the enjoyment of rights granted him under the foreign law. This would be the case of the foreign nationality acquired by a married woman during marriage. Such an acquisition of citizenship undoubtedly could not be considered as valid to effect a loss of the previous nationality and justify in her original state the enjoyment of rights under the law of the state of which the woman may have become a citizen. If these rights should be claimed before the courts of her original state, they could not consider her as a foreigner if she had not, according to the law of that state, legally acquired foreign citizenship.

This rule should apply even when the foreign nationality is acquired during a judicial separation, which does not dissolve the marriage bonds.

#### RIGHTS OF MAN AS A CITIZEN

**685.** Any person who under the law of a state is considered a citizen has the right to reside in that state and cannot be expelled.

**686.** It should be deemed contrary to the general interests of the international society, in order to get rid of native offenders, to sentence them to exile, banishment or deportation to a foreign country.

Banishment or exile from the territory of a state and from its colonial possessions can be justified only in case of political offenses.

Other states may always refuse to grant asylum to exiles and may expel them, having them accompanied to the frontier.

**687.** Every citizen of a state is entitled to recognition as such abroad, where he may demand that his status and his rights by reason of his nationality be recognized and respected, unless their exercise is contrary to the local laws of public order. He may invoke the protection of his home state, according to the rules of international law, in case of a harsh or arbitrary violation of his rights.

**688.** It should be considered as a right of man *qua* citizen to invoke the application of the treaties in force between his national state and foreign states in all matters relating to the carrying on of business and the enjoyment of private rights.

**689.** Any man who can prove his status as a citizen, may demand that the law of his state be recognized in foreign countries

to establish his personal statute and family relations, except where, according to the local law, the enjoyment of certain rights is subject to the application of the law of the place of residence.

**690.** In a foreign country, no one can demand the recognition of the authority of the law regulating his civil status, personal statute and the enjoyment of the resulting rights, if the result of the application of that law were a derogation from the territorial laws of public order or the public law of the state.

Compare, for the development of the idea set forth in the proposed rule, Fiore, *Diritto internazionale privato*, v. III, §§ 1321-1326; the paper on the limitation of the authority of foreign law in the *Atti dell' Accademia di scienze morali di Napoli*, v. XXXVIII, 1907, and the article in the *Journal du Droit international privé*, 1908, p. 351.

#### DUTIES OF MAN AS A CITIZEN

**691.** Every person who is actually the citizen of a state is bound to fulfill the obligations of citizenship.

**692.** Every citizen must be considered bound to discharge the civic obligations based on citizenship, such, for example, as war contributions, forced loans, and military service. He cannot be exempted therefrom during his sojourn in a foreign country.

**693.** The citizen who lives in a foreign country and fails to heed a call by the government of his country to fulfill his military service, is liable to punishment on his return to his native land; but he cannot be compelled by the foreign government to comply with that duty. In fact, it is not bound to lend its assistance to compel the unwilling foreigner to serve in his native army.

**694.** A citizen should avoid any act liable to prejudice the interests of a foreign state, thus exposing his own country to a weakening of its friendly relations with that state.

It is within the power of every state to adopt the necessary measures to prevent its good relations with foreign states from being affected by the acts of private persons and to punish them for injuries committed, in order to avoid any moral responsibility attaching to unjustifiable indifference.

This rule may be applied where no real prejudice to the rights of a foreign state subject to penal sanctions is involved, but where injury to interests worthy of consideration comes into question.

Let us suppose that an association of speculators wishes to depreciate the public funds of a foreign state and speculates on the fall of its securities brought about by methods known to gamblers, and that a dishonest intent to carry out

a fraudulent speculation is apparent. It seems to us that in this case the government should be bound to adopt the necessary measures to prevent the foreign interests involved from sustaining damage.

The same would apply to an association which aims to bring about the failure of an undertaking of public interest which a state has assumed. Although the members of the scheme may not commit actual statutory offenses, if it is established that they are acting in accord to carry out their dishonest purpose, we believe that some preventive action of the government which desires to maintain friendly relations with the foreign state must be considered as obligatory by virtue of the moral duty of all states to co-operate for their reciprocal well-being and prevent any act liable to entail serious and considerable injury to a friendly state.

Without entering more deeply into the question, we may observe that our rule should be understood with the moderation required by political prudence and the art of government.

**695.** While abroad, the citizen should not degrade his character and dignity as such. In the event of his committing grave offenses, such as those subject to punishment restricting personal liberty for at least three years, without having been tried by the courts of the place where the offense was committed, or without having undergone the punishment pronounced by those courts, he ought to be prosecuted before the courts of his own country, so as to prevent international and political damage arising out of his escape from punishment.

Although criminal law has *per se* the character of territoriality in consideration of the motives and purpose of criminal law, by reason of which it cannot be regarded as personal law, yet the safeguard of general interests and of the legal order may justify the punishment of the citizen who has committed an offense in a foreign country and returns to his own without having expiated the political damage resulting from the offense by undergoing punishment.

Compare: Fiore, *Effetti internazionali delle sentenze penali*, § 33, Turin, Loescher, 1877; *Id.*, *Traité de droit pénal international*, trans. by Charles Antoine, §§ 61 *et seq.*, Paris, Pédone, 1879.

**696.** No person, even when he has renounced or incurred the loss of his nationality, shall take arms against his native country; he shall be held guilty of a felony and treason, if he does not strictly observe this duty.

No civilized state can compel naturalized citizens to take arms against their native country, nor urge them to commit an act of treason.

#### INTERNATIONAL DUTIES OF MAN

**697.** No one may invoke the protection of international law or claim the enjoyment and exercise of the rights belonging to all

individuals under international law unless he recognizes its authority and complies with its rules.

698. Every individual, even when not the citizen of any particular state, is bound to observe the rules of navigation on the high seas and must be held responsible for any damage caused by reason of their non-observance.

699. Whoever, on the high seas is guilty of an act characterized as an offense under international law, is bound to answer therefor, and may be tried and punished in conformity with the rules of international law. Examples of such offenses are piracy, damage or destruction of submarine cables and their apparatus, of inter-oceanic canals, and of works intended for the common use of all states or the necessities of navigation.

#### LEGAL SANCTION OF THE INTERNATIONAL RIGHTS OF MAN

700. The international rights of man must be considered to be under the collective legal protection of all civilized states. Any attempt against the inviolability and liberty of man and against the rights which are his according to international law, shall legitimate the collective intervention of civilized states to restore the legal order violated, complying with the rules previously formulated and with those relating to the legal sanction of international law which we shall set forth hereafter.

## TITLE XXIV

### INTERNATIONAL RIGHTS AND DUTIES OF THE CHURCH

**701.** Those who voluntarily accept the principles of their religious faith and have settled in different parts of the world have the right to organize and to form as a church and to recognize the supreme authority of the head of that church, who proclaims the principles of the dogma and faith and provides for the government of their religious association.

The word *church* designates the association of worshippers spiritually united by the same faith. It is the result of freedom of conscience. It is natural that churches should differ, since the principles of belief and faith cannot be uniform. Therefore, the liberty to organize and to form as a church must be recognized and respected with regard to all persons who, inspired with the same faith, voluntarily wish to unite as a religious association. The Roman Catholic church exists in fact under very special conditions, but it does not exclude other churches having different principles of belief and faith from being organized.

**702.** Any state hindering the free constitution of the church or disregarding the autonomy or independence of its head in the exercise of his spiritual authority over believers in the faith or violating their freedom with respect to their faith and worship lawfully practised, violates international law.

**703.** No church may claim the legal status of a person of the *Magna civitas* unless its constitution and organization possess the character of an international religious institution.

This character can be assigned to it only when it is an institution constituted by virtue of freedom of conscience by a large number of persons scattered over the world, united as a religious association in the bond of a common faith and subject to the authority of a head who admittedly has the supreme power to promulgate the dogma and principles of belief, discipline and worship.

**704.** Any church, having at present the character of an international institution, has the right to demand the application of the rules of international law for the enjoyment, exercise and legal protection of its rights as a church.

## ROMAN CATHOLIC CHURCH

**705.** The right to be considered a world institution and to assume *jure suo* the status of an international person must be attributed at the present time to the Roman Catholic Church.

Just as certain circumstances of fact and law must be considered essential in order that an association of men may assume the status of a state, so must certain conditions of fact be deemed essential in order that an association of worshippers constituted as a church may possess the character of an international institution. Now, whatever may be thought of the constitution of the Roman Catholic Church, as it is and as tradition and history have made it, it cannot be contested that it alone among religions presents the characteristics of a world institution.

Compare rules 70 and 71.

## RIGHT OF AUTONOMY AND INDEPENDENCE OF THE POPE

**706.** The Pope, head of the Roman Catholic Church, in so far as he exercises his supreme authority for the promulgation of the dogma and principles of the faith to the believers who freely consent to accept them, must be held autonomous and independent.

**707.** The Pope should enjoy the right of freedom of government in all matters relating to the maintenance of the constitution and the organization of the church and worship, limiting his action, however, to the purpose of the church as a spiritual organization and without power, directly or indirectly, to resort to coercive measures.

## FREEDOM OF GOVERNMENT

**708.** The right of freedom of government may be granted to the Pope only within the limits of his legal sphere as determined by the nature and purpose of his functions with respect to the church considered as a spiritual association.

This liberty should consist in the free promulgation of the principles of belief and faith with regard to those who voluntarily accept them; in the publication of the precepts insuring the application of those principles; in the establishment of the rules of discipline and worship without recourse to coercive measures; and in the unrestricted administration of the government of the church.

**709.** The right of the Pope to communicate freely with the clergy and persons exercising spiritual functions should be considered as embraced in the freedom of government, as well as the convocation and assembling of synods and councils, the exercise in canonical form of the ecclesiastical legislative power, and the pronouncing of censures. Nevertheless, the right to request the assistance of the political authorities against persons who, instead of readily submitting to the orders of the church, prefer giving up their religion, should be denied.

**710.** Persons participating in the high government of the church or undertaking acts of spiritual power in its name, should be held answerable only to the Pope; they cannot be held answerable to the chief executive of the state except in the case contemplated in rule 714.

**711.** Any interference by the government of the state in the acts and high administration of the church shall be deemed unlawful and contrary to the principles of international law which insure the autonomy and independence of the Pope.

#### LIMITATION OF THE RIGHTS OF THE POPE

**712.** The Pope as head of the church cannot be considered qualified to acquire by succession like the sovereign of a state, even in case of a legacy left to the congregations and offices instituted by him for the exercise of spiritual power, unless, by the law of the state where the succession takes place, the church is recognized as a legal person.

The legal capacity to acquire property rights resides *de jure* in man, who is the natural subject of private rights. This capacity is also possessed by the state *jure proprio* from the time of its constitution, because as an institution of social, civil and political order, it is necessarily a legal person. In effect, considering the purpose of the establishment of the state by the people, it is evident that by its very purpose, it is essential that it be possessed of property and the capacity to acquire it. The church, having regard to its purpose, is an institution of an ethical and moral order. The freedom of association of the faithful under the authority of their supreme head must be considered as an essential condition of its existence and development. Such liberty of association does not in any way, however, imply the liberty of incorporation. The church may claim, as against all governments, the liberty to constitute and organize itself and the enjoyment of all rights deemed essential to this end. That is why it may claim international personality; but it cannot, as against all governments, claim the right to acquire property rights.

Property is not indispensable to the church to fulfill its high mission. Even



admitting that it needs economic resources to exercise its administrative functions, the possession of property cannot be considered indispensable; the charity of the worshipper so generously practised under the form of Peter's pence is sufficient. No one denies to the Pope the right to receive such bounties, and to use them for the purpose intended. We do not admit that the church as an institution is a necessary legal person. Therefore, the capacity to acquire, by succession and by gift, property or real rights in the territory of the state can be granted only by the territorial sovereignty which alone has the sovereign power to confer on corporations, endowed with legal personality, the legal power to acquire property rights.

Compare: rules 75, 76; Fiore, *Della capacità dello Stato straniero, della Chiesa e della Santa Sede di acquistare per successione*, in *Rivista di diritto internazionale e di legislazione comparata*, v. IV, 1901, p. 97; *Id. Consultazione pro veritate, Successione Zappa, Controversia tra la Grecia e la Romania*, Rome, 1894.

**713.** The exercise of the administrative functions connected with the government of the church, when their sphere of action lies within the domain of municipal public or private law, is subject to the general law in force in the state where such functions are exercised.

This rule aims to distinguish between matters connected with the government of the church and the promotion of its spiritual interests and matters relating to the administrative functions of the church. These administrative functions must be subject to the laws of the state, whenever, by the nature of things, they fall within the domain of public territorial or private law. The independence of the government of the church cannot be considered as violated by reason of the fact, for example, that the congregations entrusted with the administration of the Holy See, by the drawing of a contract which afterwards gives rise to disputes in private law, thereby become subject to the municipal law of the state and to the ordinary courts. A contract or any private law relation cannot lose its character as such by reason of the participation of some one who has a part in the government of the church.

**714.** The Pope cannot, by virtue of his autonomy and independence in promulgating the principles of doctrine and belief, encourage the faithful to commit acts contrary to the laws of the state or prejudicial to public interests.

It is the duty of the state, while respecting the inviolability of the Pope, to subject to the laws in force and to the penal sanctions of municipal law persons who, because of religious doctrine or sentiment, commit overt acts contrary to the rights and interests of the state.

The purpose of this rule is to determine the legal domain within which the liberty of the Pope to undertake acts of government in canonical form can be exercised. It is indisputable that the Pope should not be held responsible even when he promulgates the rules of discipline imposed on the faithful who consider themselves bound conscientiously to adopt those rules. Since, however, the acts promulgated by the Pope in matters of discipline constitute for the

faithful rules of conduct, if the ecclesiastical authorities intended through those acts to encourage the worshippers to oppose the application of the public law of the state and its ordinances with respect to civil or political matters, this fact would naturally justify the latter in defending itself against the acts of the ecclesiastical authorities. In the first place, it could forbid such acts being brought to the knowledge of the worshippers by placarding the outside of churches or otherwise prohibiting their publication. Furthermore, it could subject to the criminal law persons who, by reason of the instigation of the ecclesiastical authorities, have infringed the rights of the state.

**715.** The Pope cannot exercise any coercive jurisdiction, even within the confines of the buildings assigned to the Holy See, or any functions implying the exercise of powers of political sovereignty.

The church cannot be likened to a state, nor may the Pope, as sovereign of the church, be likened to a king as sovereign of the state. The two institutions are essentially different. One is of an ethical and moral order—the church, in fact, constitutes the union of souls spiritually bound by the same faith. The character of the other is social and political. Therefore, it is evident that one institution cannot be compared with the other and that the rights which belong to the sovereign of the state cannot be claimed by the Pope as sovereign of the church.

The Italian law of May 13, 1871, on the prerogatives of the Sovereign Pontiff, assimilates the Pope to a sovereign by his personal inviolability, by penal sanctions designed to prevent and punish attacks upon this inviolability and by the sovereign honors conferred on him. Yet, as it does not imply the assimilation of the two sovereignties, it cannot imply an equality of rights, attributes and functions of the two sovereigns.

#### INVIOABILITY OF THE POPE

**716.** The Pope should be considered inviolable and without responsibility for the exercise of his spiritual power and exempt from the jurisdiction of the regular courts.

Compare rule 356.

**717.** It is incumbent on every state to repress by effective penal sanctions not only every attack upon the person of the Pope, but also offenses and insults offered him through speeches, acts or other means which directly or indirectly offend him.

Non-compliance with this duty may justify collective intervention.

#### RIGHT OF REPRESENTATION

**718.** The Roman Catholic church, which is to be considered as a person of the *Magna civitas*, has the power to exercise the right

of representation near the governments of states which have agreed to enter into diplomatic relations with it. The exercise of this right, however, is not identical with that exercised between two governments.

This right should be exercised by persons who are entrusted with that mission by the Pope.

It is to be observed that personality is one thing and the exercise and enjoyment of the rights which attach to the person is another. The church as an international institution, may assume *jure suo* the status of a person, but may not as such enter into relations with a certain state and undertake in fact the exercise and enjoyment of international rights with respect to that state except with the previous consent of the sovereign.

Compare rules 165 *et seq.* and 438.

**719.** The right of legation which is possessed by the Roman Catholic church is not identical with the right of legation of states; the church, moreover, cannot claim to be considered a state by reason of the exercise of that right.

The right of the head of the church to maintain direct relations with the head of a state who has consented thereto is based on the principles of public municipal and international law. Considering the frequent intercourse between the ecclesiastical and the political authorities concerning the carrying on of worship and the administration and external manifestation of religious functions, the sovereign of the state cannot be denied the right to regulate such matters by agreement with the head of the church and even, in appropriate cases, to conclude a concordat; nor is it possible to deny the reciprocal right of the sovereign and the Pope to send one another diplomatic agents to regulate matters which have constituted the object of the concordat or those with respect to which, without having concluded a concordat, the two authorities desire to proceed in common accord.

All this may serve to explain the true character of the agents (*nuncios, legates, etc.*), charged with maintaining friendly relations between the head of the church and the sovereign of the state. It is apparent how, by reason of the personal independence of the head of the church with respect to the exercise of his supreme authority, the independence of the persons delegated to represent him before the governments which have consented to receive them must likewise be recognized. But in these matters there is no ground to assimilate the church to the state in the exercise of the right of legation. The diplomatic agents of the state represent the political sovereignty in the exercise of its political functions and in its relations with a foreign government; the diplomatic agents of the Pope represent the head of the church in the exercise of his spiritual authority in so far as such authority may enter into relations with the attributes and functions of the foreign government. Therefore, the two things differ as completely as the state and the church: on the one hand, political sovereignty and functions, on the other, spiritual authority and power.

**720.** The diplomatic agents of the Pope should everywhere be considered under the protection of international law, so far as the

respect due their public character and the liberty to fulfill their mission are concerned.

They should enjoy the prerogatives and immunities attributed by international law to diplomatic agents travelling through the territories of third powers to reach the seat of their mission or return therefrom. In the state which has consented to receive them as the Pope's envoys, they should enjoy the rights, privileges and immunities which are granted them by the law of that state.

By article 11 of the Italian law of May 13, 1871, on the prerogatives of the Pope, it is provided as follows: "Envoys of foreign governments to His Holiness enjoy in the kingdom all the prerogatives and immunities of diplomatic agents in conformity with international law.

"To offenses against them are extended the penal sanctions which apply to offenses against the envoys of the powers near the Italian government.

"Envoys of His Holiness to foreign governments are assured in the territory of the kingdom the customary prerogatives and immunities under the same law, when proceeding to and returning from the place of their mission."

A careful reading of this article clearly shows the inaccuracy of the opinion that the law of 1871 has accorded the right of legation to the Pope. His right to maintain direct relations with the sovereigns of states which consent thereto unquestionably does not grow out of the Italian law of 1871 and would not be abrogated should that law be repealed. The maintenance of diplomatic relations through agents vested with a public character is, with respect to the foreign state wishing to maintain such relations, an act of sovereignty within the domain of its autonomy. What the foreign government could not claim as of right would be that the agents sent by it and accredited to the head of the church should enjoy in Italy the prerogatives and immunities granted by international law to diplomatic agents. Moreover, the Pope could not claim that his envoys be given in Italy the same prerogatives and immunities when they proceed to or return from the place of their mission.

That is what article 11 of the above-mentioned law has granted.

#### INTERNATIONAL DUTIES OF THE CHURCH

**721.** Every church is bound to exercise all its rights and functions within the legal limits determined by its nature and purpose as an institution of a moral order.

**722.** It is incumbent on the head of the church and on the ecclesiastical authorities who exercise the functions of government assigned to them to refrain from resorting to any direct or indirect external coercive measure to regulate and preserve discipline and to refrain from requesting any kind of assistance from the political authorities.

**723.** The head of the church violates international law and the right of freedom of worship when, by previous agreement, he secures the assistance of the political authorities to exercise his spiritual powers.

This is the case also when the object of the previous agreement between the two authorities is reciprocally to assist each other in the enforcement of their respective powers.

#### RELATIONS OF THE CHURCH WITH THE STATE

**724.** The Roman Catholic church cannot claim any special privilege or prerogative as against other churches, but only the enjoyment of the international rights which it now possesses in consideration of the special historical circumstances in which it is placed with respect to other religions.

**725.** It is the duty of every state to consider the Roman Catholic church as in the same legal position as any other religion in its relations with municipal public law, and to regulate the legal position of all churches so as to respect the right of freedom of worship both as an individual and as a collective right.

Compare rules 650 *et seq.*; 701 *et seq.*

**726.** Every church, so far as the external development of its functions and the exercise of worship are concerned, must be deemed subject to the laws of the state where the religion is practised, and its relations with the sovereignty of the state must be considered within the exclusive domain of public municipal law.

**727.** Every state must insure full liberty to the ecclesiastical authorities in the fulfillment of their duties and refrain from annoying them or subjecting them to investigations or to censure in the matter of the promulgation of dogma, the rules of discipline, the administration of sacraments and religious acts performed without prejudice to the rights of the state.

**728.** Every state must be considered bound to abolish any special restriction upon the exercise of worship and the powers possessed by the head of the church. Any interference of the political authority, under the form of governmental assent, in the publication of the acts of the ecclesiastical authority or in the exercise of the powers of the Sovereign Pontiff, must be considered as a violation of the independence of the church.

**729.** The exercise of the powers of the head of the church and the sovereign of the state in their reciprocal relations must be considered as based on the essential concept of their respective liberty and of the complete separation of the two institutions, except as to the exact determination of the legal sphere within which the autonomy and independence of the two sovereignties must be acknowledged.

**730.** The rules which serve to determine the relations between the political and the ecclesiastical power, so far as the exercise of their respective rights and duties is concerned, may be the object of a concordat concluded between the sovereign of the state and the head of the church, in conformity with the constitutional law of the state and with the rules of international law.

**731.** The concordat cannot be likened to a treaty between two states. It must always be deemed an act governed by public municipal law. Consequently, it remains in force until repealed. If, however, the prerogatives of the church and of the Pope under international law should be recognized in the concordat, and it should then be repealed, the church and its head could nevertheless claim their prerogatives according to international law, which must be deemed independent of concordats.

#### LEGAL PROTECTION OF THE RIGHTS OF THE CHURCH

**732.** The international rights of every church should be considered under the collective guaranty of all the states which constitute the *de facto* society. Differences which may arise between the Pope and the sovereign of any state in the respective exercise of their reciprocal rights should be settled in the forms to be indicated hereafter for the determination of international disputes. As to differences which may arise from the exercise of the respective rights within each state, they must be considered within the domain of public municipal law.

In order to explain the basic idea of this rule, we would observe that, being unable to disregard the historic fact that the Roman Catholic Church has at present the position of an international institution, or to dispute the right which it possesses as such to be considered an international person, although not a state, we have reached the conclusion that the church has international rights, which we have had to determine. These rights are quite distinct from those which it may possess as a religious association and as a corporation. They must be determined and governed by municipal law. It must be said

that the church cannot, unassisted, insure the observance and protection of its rights; for it has not the powers and means which the state has at its disposal to protect itself. The partisans of the claims of the papacy, who have upheld the need of temporal power, have alleged that the church ought to constitute a state in order to be independent and to provide for the protection of its rights in the same manner as the state. It seems to us, however, that this conception is inspired by a sophism tending to confound the two powers and to misrepresent the two institutions. The legal protection of the rights of the church may be achieved through the collective guaranty of civilized states. Every state, whether Catholic or not, must protect with solicitude the freedom of worship of its citizens. Catholics are not found in any one country; they number millions upon millions scattered throughout the world. Therefore, all the states of Europe, America and other parts of the world are bound to protect the freedom of religious belief of their Catholic citizens, and have the right and duty to prevent the freedom of their religious faith from being violated, not only as an individual but as a collective right, in so far as all persons united by the same faith belong to the Roman Catholic church and are subject to the supreme authority of the Pope who represents that church. Any attack upon the autonomy of the church and upon the independence of the Pope and the free exercise of his rights as head of the church is an attack upon the church itself and upon the freedom of worship of the persons who constitute it.

Therefore, it is incumbent on every state, which must safeguard the personal rights of man, including that of freedom of conscience, to prevent the violation of these rights. Collective intervention to assure the autonomy and independence of the Catholic Church as a spiritual institution arises, therefore, reasonably as a right and duty on the part of all states to protect the right of freedom of worship. All must consider themselves equally interested in maintaining the political sovereignty of each country within the field of its own rights, by preventing its taking undue advantage of those sovereign powers to violate rights which, according to international law, belong to the Roman Catholic Church.

Conflict between the two institutions cannot always be avoided, but may be solved like any other international difficulty by peaceful means, namely, good offices, mediation of friendly powers, and finally, arbitration or other means admitted by international law, of which we shall speak hereafter. The Pope could not declare war, as the church is not a state; but he can be more efficiently protected, so far as the exercise and enjoyment of the rights he possesses under international law are concerned, through peaceful means.





**BOOK TWO**  
**INTERNATIONAL OBLIGATIONS**



## TITLE I

### GENERAL AND FUNDAMENTAL RULES

**733.** International obligations arising between one state and another are derived from treaties, acts (cartels, manifestos, declarations, etc.) and facts which imply and involve international effects and relations voluntarily created by those exercising sovereign power.

**734.** States alone, by express or tacit consent, may assume toward one another the obligation to give, to do or forbear from doing a particular thing; to regulate or to limit the exercise of their respective rights; or to annul or to modify the obligations previously assumed.

**735.** Every obligation contracted by one state toward another produces a legal duty of the obligor to carry out his undertaking, and a legal right of the obligee to demand and exact its fulfillment.

The object of the above rules is to establish the nature and true character of an international obligation and to determine its subjects.

The international obligation, unlike that which may exist between private persons in civil and commercial matters, is, by reason of its nature and object, a political and public obligation. Whether it produces engagements and rights of the nature of property, or is designed to regulate and limit the exercise of the respective sovereign rights, it always implies an engagement contracted by the state, as a political person, towards one or more states, with which it has intercourse in international society.

Engagements of a property or fiscal nature affect the economic life and financial interests of the state as a person, and do not distinctly burden the individuals who compose the state, but rather the political community considered as an *universitas*: *Quod debet universitas singuli non debent* and *quod universitas debetur, singulis non debetur*.

It follows, therefore, that the proper subject of an international obligation, even when it consists in the obligation to give, to do or forbear from doing, can only be the state as a political institution.

The same is true of obligations which may arise from facts involving international effects and relations, because it is evident that the state alone as an *universitas* can assume the responsibility arising out of the exercise of sovereign powers in international relations.

Obligations which seek to regulate or limit the exercise of reciprocal rights of sovereignties can be contracted only by states. They alone by reciprocal agreement can establish particular rules of their respective relations and

pledge themselves to subject their acts to the particular legal rules adopted in common. Thus, through reciprocal agreement states may recognize the binding force of any particular legal rule by assigning to it the authority of "common" law.

It is evident, therefore, that the state alone may contract an international obligation, and that, accordingly, it alone may be considered as a subject capable of concluding an international treaty.

One of the arguments invoked by authors who have firmly upheld the aphorism that the state alone may be deemed the subject of international law, is that it alone can conclude a treaty. But this argument is of questionable value if we take into consideration the fact that the capacity of every one is determined by his legal status. We also admit that the state alone can contract a true international obligation; but that is not at all inconsistent with what has been said in Book I, with respect to the persons and entities subject to international law and is explained by the simple consideration that the state alone may be regarded as capable of so contracting. We must repeat that the legal capacity of every one depends absolutely on his legal status, and recall that while we have admitted that man and the church are persons of the international society, we have, on the other hand, always maintained that their legal status is *substantially different* from that of the state. Accordingly, the unquestionable conclusion is that their capacity must also be different. It is clear, therefore, why the state alone may sign a treaty and assume international obligations.

The international obligation, being inherently political and public, can be created only by the state, which is a political and public institution.

**736.** Express or tacit consent is the basis of every positive obligation contracted by one state toward another.

This rule must be understood in the sense that, through reciprocal consent, states may assign the authority of law to rules agreed upon and not in the sense that their reciprocal consent may be sufficient to create an obligation. The sovereign power to create an obligation by consent is limited mainly by the legality of the subject-matter and by the substantial requirements for the validity of the consent.

See rules 760 *et seq.*

**737.** Two or more states which, by words or acts equivalent to words, have manifested the agreement of their wills to establish or modify their respective rights or to regulate, annul or limit a legal relation subsisting among them, must be considered as reciprocally bound by reason of their consent, expressly manifested, to observe their engagements.

**738.** Every state which, in its relations with another, has voluntarily observed a constant rule of conduct in a series of acts, unequivocal, uniform, notorious, continuous and in conformity with international law, is to be held bound, by tacit consent, to adhere to that rule of conduct so long as it is not expressly disavowed, or events arise which prevent its observance.

**739.** No consensual obligation should be held valid if contrary to a rule of international "common" law.

**740.** Every state must be considered legally liable, by reason of its international responsibility, for all the consequences of injuries inflicted, in the exercise of sovereign powers, upon a foreign state or private individual.

#### DIFFERENT FORMS OF OBLIGATIONS

**741.** Consensual obligations between states are bilateral or unilateral.

By the former, the contracting parties reciprocally obligate one another.

The unilateral obligation is one contracted by a state towards one or more states, without the assumption of a corresponding obligation by the latter.

**742.** All obligations contracted by states may be divided into:

- a. Positive or negative;
- b. Simple or conditional;
- c. Joint or alternative;
- d. Principal or accessory;
- e. Binding or optional;
- f. Divisible or indivisible;
- g. Of definite or indefinite duration.

**743.** The substance of an obligation, having regard to its nature, must be determined according to the general principles of "common" or natural law, in so far as a similarity between the obligations contracted by private persons and by states may be admitted.

Although the general principles of "common" and natural law relating to consensual obligations and to their nature and consequences cannot be materially different from those applicable to obligations contracted by states, it would nevertheless be a mistake to admit of a complete similarity between civil and international obligations.

## TITLE II

### TREATIES AND THE CONDITIONS FOR THEIR VALIDITY

#### TREATIES IN GENERAL

**744.** Any convention between two or more states, drawn up in writing and concluded with a view thereby to create an obligation or to annul or modify one already subsisting, is called a *treaty*.

**745.** Treaties may be divided into *named* and *unnamed*.

The former are those which by international law are designated by a particular name, derived from the subject-matter of the agreement. Such are treaties of commerce, territorial cession, extradition and the like.

*Unnamed* treaties are those concluded for different objects, not subsumed under a specific name, but which, nevertheless, affect certain political or social interests of states. They are more commonly called conventions.

**746.** Whatever the denomination of a written act concluded by the sovereignty of the state to declare its will to bind itself, the resulting international obligation with all its effects should be considered as subsisting whenever the act complies with the substantial conditions necessary to its validity.

In practice written acts containing agreements between two or more states are sometimes called either treaties, conventions, declarations, cartels, or protocols, etc. These various names, however, do not alter the substance, because the desire to bind oneself may be valid whatever the act be called. According to the commonest usage, the term *treaty* is applied to the more important acts, for example, those relating to commerce and navigation; and the term *convention* to the less important acts, such as agreements for the publication of customs tariffs, for the exchange of parcels post, and for the regulation of the transportation of merchandise by railroad, etc. The term *declaration*, or simple agreement, designates conventions relating to particular objects, such as the interpretation of the articles of a treaty, or the engagement to communicate reciprocally certain acts (acts of civil status, information service, etc.)

## REQUIREMENTS FOR THE VALIDITY OF A TREATY

**747.** The conditions necessary to the validity of a treaty are:

- a. The capacity of the parties;
- b. Reciprocal consent, legally expressed;
- c. A lawful and attainable object, according to the principles of international law.

See our work: *Trattato di Diritto internazionale pubblico*, 4th ed., v. 2; *Condizioni intrinseche per la validità di un trattato*, pp. 273 et seq.

## CAPACITY TO CONCLUDE A TREATY

**748.** Any state which enjoys rights of sovereignty must be deemed capable, in principle, of concluding a treaty and thus contracting legal obligations and acquiring rights with respect to the other contracting party, subject, however, to the limitation set forth in rule 739.

This capacity, furthermore, may be possessed by associations to which international personality has been attributed (see rule 81) within the limits, nevertheless, of the purposes for which personality was recognized and is considered as subsisting.

The International Congo Association, to which international personality was attributed for the limited purpose for which it was formally recognized, was regarded as capable of concluding treaties, and has concluded several, including one with Italy, December 19, 1884.

The Customs Association of the German States, known as the *Zollverein* had the power to and did conclude, in its own name, several treaties, until it lost its international personality by the establishment of the German Empire.

**749.** The power to conclude treaties may be attributed to states not fully possessed of international personality, when, by the constitutional law governing their union, this power is reserved to them for certain specific objects.

It is always necessary to refer to the constitutional compact which governs the union of two or more states and their relations of protectorate or vassalage, to establish their capacity to conclude treaties and the limitations on their capacity.

Semi-sovereign states sometimes have the power to conclude treaties which have neither the nature nor the character of political treaties, such, for example, as conventions relating to the postal service and transportation by railroads. Bulgaria, which, under Article 8 of the Treaty of Berlin of July 13, 1878, was not capable of concluding treaties of commerce and of a political character without the previous consent of the Porte, nevertheless, on June 11/

23rd, 1893, concluded a treaty with Greece to regulate the question of the nationality of Greeks living in the principality. In like manner, in order to determine the competency of Egypt, it is necessary to examine its relations with Turkey, so as to determine within what limits it may conclude treaties with foreign states.

**750.** In a state, constituted under the form of a federated state or of a confederation, the power of the individual states to conclude treaties must be determined by their international personality, as fixed in the constitutional compact.

A federative union or confederation of several states may sometimes give rise to an international personality based on the title of the union and distinct from the international personality of the states united as a confederation. Such was the case with the former Germanic Confederation, which had its legal personality as such and could conclude treaties concerning matters of general interest to the confederation, as it had been created by the final act of the Congress of Vienna of 1815. This international personality possessed by the confederation permitted that of the constituent states to subsist and with it the capacity of each to conclude treaties within the limits of its own jurisdiction.

#### PERSONS COMPETENT TO CONCLUDE TREATIES

**751.** Only persons having the power to negotiate and conclude a treaty under the constitutional law of the state should be deemed competent to negotiate a treaty in the name of the state.

**752.** When, by the constitutional law of a state, the Executive is given the power to negotiate treaties, reserving to another governmental body a final assent to their definitive conclusion, the rules of the constitution govern the competency of the various parties in the conclusion of treaties.

According to the constitution of the Kingdom of Italy, Article 5, the King, as chief executive, is competent to conclude treaties of peace, alliance and others, with the single obligation that he must notify Parliament. As to treaties involving financial burdens or changes in the territory of the state, they become effective only after their approval by Parliament. Therefore, the King may conclude a treaty of navigation, but commercial treaties, which necessarily have financial consequences, can become valid only after their approval by Parliament.

In Germany, under Article 11 of the Constitution of April 16, 1871, the Emperor represents the Empire in its international relations and concludes with foreign states treaties of alliance and others in the name of the Empire. If, however, the treaties refer to objects which, according to the provisions of Article 4, are within the sphere of legislative competence of the Empire, the assent of the Federal Council (*Bundesrat*) is required for their conclusion and the ratification of the *Reichstag* for their validity.

It is clear that under this article, the Emperor cannot alone assure the



validity of treaties of commerce, customs and those relating to the other objects specified in Article 4 of the Constitution.

Compare: Fiore, *Trattato di Diritto internazionale*, § 1019.

**753.** Plenipotentiaries may be considered as properly delegated to represent the state to negotiate and conclude a treaty, when they are provided with official full powers, conferred upon them for that purpose. They should be exhibited to the other party, who should take cognizance of them. Conventions concluded within the limits of the full powers officially exhibited should be regarded as legally concluded.

**754.** Secret instructions given to the plenipotentiary delegated to conclude a treaty cannot have any legal force to modify in its international effects the full powers officially communicated to the other contracting party.

In case the plenipotentiary has concluded a treaty within the limits of the full powers exhibited, but contrary to the secret instructions of his government, he would incur personal responsibility to his government, which might justifiably punish the delinquency in conformity with its municipal law, but could not affect, in any way, the legal value of the international obligation contracted by virtue of the instructions contained in the full powers of its agent.

#### RATIFICATION OF TREATIES

**755.** Ratification must be considered essential to making a treaty final and perfect:

- a. When required by the constitutional law of the state to make the treaty binding upon it;
- b. When the plenipotentiaries who negotiated and concluded the treaty have made its validity dependent upon its ratification by the sovereign they represent or by the proper authorities.

Outside of these cases a treaty concluded by a plenipotentiary and signed by him without reserving ratification, by virtue of the full powers conferred on him and duly exhibited to the other party, and within the strict limits of his powers, must be considered as final and perfect from the day of its signature.

Ratification cannot be considered an essential condition of the conclusion of a treaty when, under the constitutional law, the sovereign has the power to

conclude it. There is nothing in that case to prevent the sovereign, as chief executive of the state, from delegating his power to a plenipotentiary by conferring on him the right to definitively conclude and sign his name to the treaty. A treaty executed under such circumstances, so far as the international obligations contracted by the chief executive of the state are concerned, must, independently of ratification, be held perfect and final for all purposes as between the contracting parties.

If, as is the case under the Italian constitution, the head of the state may conclude certain treaties, on condition of notice to the legislative bodies, that formality should be deemed one of mere municipal public law. Therefore, treaties of that category, concluded by a plenipotentiary vested with full powers of concluding them independently of the sovereign's ratification, ought to be regarded as perfect and final as an international obligation. Even if the chief executive should fail to give notice of such a treaty to the legislature, the result would be that within the state the treaty could not be considered to possess binding legal force, by reason of the absence of a constitutional formality. But it would not lessen in the least the legal value of the treaty with respect to the foreign state and might involve the international responsibility of the government for having failed to do what it should have done to make the treaty binding on its citizens.

The case is quite different when, under the constitution, the head of the state is not qualified to conclude the treaty without the consent of the legislature. In such case, as the other contracting party must know the power of its co-contracting party, it cannot consider the approval of the legislature as a question of public municipal law, but a condition indispensable to the legal value of the treaty. In the absence of this condition precedent there is no treaty, nor do the international obligations created therein by the chief executive exist, for the reason that the latter had the power to enter into an obligation only with the consent of the legislature.

In practice treaties concluded by plenipotentiaries become binding between the contracting parties from the day of the exchange of ratifications. This practice, however, does not preclude treaties of the first category from being considered final and perfect independently of ratification, when such reservation of ratification is not stipulated in the full powers, or was not made by the plenipotentiary in the protocol of signature.

#### CONSENT REQUIRED FOR THE VALIDITY OF A TREATY

**756.** Treaties concluded between states must be freely assented to. Assent is not valid if given by mistake, extorted by violence or obtained by fraud.

**757.** The consent cannot be considered as lacking freedom when the treaty is assented to under pressure of a hostile power which has occupied part of the state territory, threatening the invaded state with greater disaster if the proposed conditions should not be accepted.

In laying down this rule we do not mean to say that any condition whatever imposed by the victor on the vanquished and accepted in a treaty should be

considered as freely assented to. It is necessary in that respect to apply the rules relating to treaties of peace and the lawful subject-matter of conventions between the victor and the vanquished. We do say, however, that when a party, taking advantage of its right to resort to armed force to compel an adverse party to give, to do or refrain from doing, or to recognize a disputed right, has occupied the territory of the enemy in order to compel the latter to recognize, against its will, the disputed right, or to make amends for an offense, and has imposed on the vanquished, with that end in view, the obligation to sign a treaty, the fact that the latter has consented to such signature merely for the sake of avoiding greater calamities cannot, in itself, constitute sufficient ground for invalidating the treaty on the pretext that the vanquished lacked full liberty of assent at the time of signature.

**758.** Duress resorted to by one party to a treaty against another is a ground for nullity only when it constitutes true physical violence, or when the person who signed the treaty was compelled to do so through external constraint which deprived him of all deliberation and freedom of judgment.

Such would be the case of a treaty concluded by a sovereign fallen into the power of the enemy and constrained to sign it by means of bodily violence or by reason of measures calculated to inspire him with a justifiable fear.

**759.** Fraud may be deemed a ground for the nullity of treaties only when the fraudulent methods resorted to by one of the parties were such as to mislead the other party as to the object of the convention.

This rule finds its application in the case of treaties concluded by a plenipotentiary possessing absolute and full powers, with faculty to conclude finally, without necessity of ratification. Diplomatic devices resorted to by a party, even if such that the other party without them would not have signed the treaty, would not in themselves constitute a ground for nullity. The rules of the civil law relating to the validity of obligations and to the defects of consent cannot be fully applied to international treaties. Indeed, these acts, while consensual conventions, can not be subject to the same rules as consensual contracts between private persons, because the general interests of mankind require that treaties be respected, and the rules relating to duress, fraudulent devices and mistake as causes vitiating consent in contracts between private persons experience important modifications in the case of international conventions concluded between states.

#### LAWFUL SUBJECT-MATTER OF TREATIES

**760.** No state may by a treaty engage to do anything contrary to positive international law or to the precepts of morals or universal justice. No state may by treaty absolutely renounce its fundamental rights, enumerated in rule 62.

**761.** A lawful subject-matter of contracts between states should

be considered to be only such as concerns the public interests of the state and may be regarded as within the conventional power of the contracting parties, according to the principles of "common" law.

**762.** An engagement which violates, to the injury of another state, an obligation previously contracted by treaty with one of the parties, cannot constitute the object of a convention.

**763.** Anything implying a violation of the constitutional law of either contracting party cannot constitute a lawful subject-matter of a treaty. But a subject-matter not in harmony with the municipal law of one of the contracting parties may be covered by a treaty, provided the contracting party has not conditioned the legal force of the treaty upon a change in its municipal law.

The sovereign of a state cannot be regarded as competent to violate the constitution, and since the other party ought not to be ignorant of the constitutional law of the state with which it is negotiating, it is impossible to consider as the lawful subject-matter of a treaty anything directly opposed to the respective constitutional law of the contracting states.

As the laws in force may be amended when not contrary to constitutional law, a treaty cannot be considered void on the ground that the law in force is an obstacle to the fulfillment of the engagements contracted. It is for the government to decide, with political foresight, whether it may rely on the enactment of legislative changes necessary for the execution of the treaty subscribed. Undoubtedly, if it had made the validity of the treaty conditional upon anticipated changes in its municipal legislation, it would be bound to do everything in its power to obtain from the legislature the necessary amendment of its municipal law. If, on the contrary, without political foresight, the government had concluded a treaty promising the legislative amendments required for its execution and if it then transpires that the legislature refuses to amend the laws in force, the state would incur a double responsibility, that is to say, political responsibility of the government to the representatives of the nation and international responsibility to the other contracting party. The political responsibility would raise a question of public municipal law; and when the head of the state, notwithstanding its opposition to municipal legislation, declares the treaty executory, the municipal courts of the state are not bound to give it effect. If, however, he fails to declare the treaty executory by reason of its opposition to municipal legislation, he incurs international responsibility for having contracted with another state an obligation he was unable to fulfill. The treaty, considered as a convention between states, cannot become null and void because the executive of one of the states could not obtain from the legislature the promised amendment of municipal legislation, by which promise he engaged his international responsibility for having contracted without reservation an engagement which afterwards he found himself unable to fulfill.

## EXTRINSIC REQUIREMENTS, INCLUDING FORM

764. International treaties should be drawn up in writing, and do not acquire perfect form until they have been subscribed by all the parties to them.

765. An agreement upon certain articles of a treaty, even when drawn up in writing and signed by the contracting parties, cannot be considered a perfect reciprocal obligation with respect to the clauses adopted, independently of the final conclusion and signature of the treaty.

When, however, the clauses agreed to and subscribed are considered as a preliminary convention, concluded in order to establish the reciprocal obligations of a *status quo*, they should be regarded as perfect and valid until the conclusion of the final treaty or of a formal declaration that the parties consider themselves freed from any previous engagement.

766. When, in the negotiation of a treaty, a reciprocal agreement is reached on various distinct points, principal or accessory but related, and this agreement has been drawn up in writing and signed by the contracting parties, the engagements assumed do not acquire binding legal force until the treaty is finally concluded and agreement established on all the separate parts which constitute the treaty as a whole.

767. The form of the reciprocal agreement concluded between the contracting parties may vary according to the degree of importance of the object of the convention. We may, therefore, consider as sufficient a diplomatic exchange of two declarations written and subscribed by persons duly authorized, or of two cartels, notes, or manifestos, properly subscribed.

768. An agreement relating to particular matters concluded by persons competent to contract international obligations will be valid, even though not drawn up in writing, but concluded verbally, on condition, however, that the agreement may be proved without difficulty, and that evidence thereof may be readily adduced.

This rule may find its application in case of preliminary agreements in time of war concluded by persons duly authorized; although concluded verbally, they must be regarded as binding as written conventions.

## TITLE III

### LEGAL FORCE AND EXECUTION OF TREATIES

#### INVIOABILITY OF TREATIES

**769.** International conventions duly concluded between the parties have the same authority as law and must be held inviolable.

They cannot be revoked except by mutual consent of the parties or for causes determined by international law, ascertained and recognized as having force to that end.

**770.** Every treaty binds the parties, not only with respect to matters formally promised by each, but also incidental matters which, according to equity, usage and the rules of international law, must be considered as virtually included in what was promised.

**771.** An impairment of or injury to moral and economic interests, which may result from the faithful execution of a treaty duly concluded, cannot be a sufficient reason for not observing it (compare rule 778).

Every government should be thoroughly aware of the obligations it contracts, and if it should inadvisedly have consented without sufficient information, it ought to bear the consequences of its imprudence, without disavowing the authority and violating the obligations of the treaty on the pretext of injury to the interests of the state and possible damage to itself.

Compare rules 787, 833 and 834.

**772.** Every valid treaty gives rise, not only to a perfect right on the part of either party of exacting the fulfillment of the assumed obligations, but also to a right to prevent third powers from meddling in the agreement or from placing any obstacle in the way of its faithful execution.

#### EFFECTS OF TREATIES

**773.** A treaty takes effect only from the time it can be considered legally perfect.

**774.** When ratification is necessary to the legal existence of a

treaty, duly concluded and signed (see rule 755), it shall take effect only after ratification.

Nevertheless, the contracting parties may stipulate that when the treaty is ratified, its effects should relate back to the time of its signature. But this requires an express declaration.

**775.** International conventions must, in principle, be considered as having effect over all the territory of the state and be regarded as extending actively and passively to all its dependencies, unless a contrary conclusion may be drawn either from a special clause in the convention, from the nature of the treaty itself or from the general principles of "common" law.

This rule may help to solve the problem of determining whether treaties concluded by a state should extend to its colonies, to its possessions abroad and to the provinces that it may have annexed since the conclusion of the treaty. For that purpose, it is necessary to refer to the convention itself and to consider whether it was concluded with or without reservation as regards colonies, possessions or annexed provinces, and to examine the form of the constitution of those colonies or possessions and the nature of their union with the state which has concluded the treaty.

**776.** Every treaty must have full effect, even when some change takes place in the form of the government or the internal constitution of the state, except as this may be modified by rule 836.

It must be regarded as valid with respect to the state in whose name it was concluded, so long as the international personality of that state subsists.

**777.** Treaties legally and validly concluded by the sovereign of the state transmit their obligations upon the state, actively and passively, to whosoever succeeds by universal title to the rights of sovereignty, in conformity with the rules which govern cessions and annexations.

**778.** Treaties concluded to regulate matters of public or social interest to the contracting states extend their effects to legal relations which arose before their conclusion, save in the case of an express declaration to the contrary.

When, however, the application of a treaty to legal facts or relations prior to its conclusion would result in injury to or diminution of private rights already vested in individuals, the treaty cannot apply to these rights.

This rule relates to the retroactive force of a treaty, and, in order to make the principle clear, it must be remarked that treaties have the authority of law, even as to their effects upon the rights of private persons. In matters of public

law, the respect for vested private rights cannot influence the applicability or effect of the treaty. Thus, if a treaty has modified the rules governing the jurisdiction of the courts of the two contracting states, or the execution of foreign judgments in the respective territories, private individuals in either state could not claim that differences arising between them before the conclusion of the treaty ought to be settled by the application of the rules previously in force relating to jurisdiction and the execution of judgments. In matters of public law and social order, rights acquired by private persons could not be taken into account to defeat or modify the authority of the new rules sanctioned by the treaty. Should the treaty, on the other hand, modify, for example, the rules relating to the acquisition and loss of citizenship in the state, the rules sanctioned therein would not be applicable to persons who were already citizens of either of the countries. The same thing would be true with respect to a treaty that would include within literary copyright the right to forbid translation; such a treaty could not apply to translations already made before its conclusion. See Fiore: *Delle disposizioni generali sulla pubblicazione e interpretazione delle leggi* (Marghieri; Unione Tip.-Ed. Tor., 2d ed., 1914) v. I: *Sulla irretroattività delle leggi*, chap. II, par. 27 *et seq.*; *De la irretroactividad e interpretación de las leyes* (Madrid, 1893); and *ibid.*, *De la retroactividad e irretroactividad de las leyes de procedimiento en los juicios civiles*, p. 429.

#### EFFECTS OF TREATIES WITH REGARD TO THIRD PARTIES

779. A treaty can establish, modify, extend or extinguish rights only between the states which concluded it as contracting parties; as to third states, not parties to the treaty, it must be considered as *res inter alios acta*.

780. When two or more parties to a treaty have inserted some clause impairing the interests of a third power, such clause must be considered inoperative as to a state that has not taken part in the treaty, even in the absence of protest.

781. When, in a treaty, an advantage to a third state has been provided for, such stipulation does not become perfect and operative unless the third state has declared its intention to take advantage of it, or has in fact profited thereby.

782. Non-acceptance on the part of the third state cannot affect the validity of the treaty unless its acceptance constitutes an integral and principal part of the agreement, by making the validity of the treaty conditional upon its acceptance by the third state.

783. No stipulation can be held valid and operative unless it has been agreed to by each of the contracting parties in its own name. When one of them, unknown to a third state, has promised something for the third state, undertaking to obtain its consent,



that party is bound to use its good offices with the said power to obtain the approval of the clauses which concern it; but it would not be bound to do anything, if, confident of fulfilling its undertaking by the employment of its good offices, after having assumed an engagement in the name of a third power, it had subsequently been unsuccessful in obtaining the expected adhesion, notwithstanding the employment in good faith of all means to that end.

#### EXECUTION OF TREATIES

**784.** International treaties must be held to be contracted in good faith and executed accordingly. The contracting parties are always bound, not only to carry out what they have expressly stipulated, but also whatever may be presumed to have been within their common intention, considering the subject-matter and nature of the treaty.

**785.** Neither party should be allowed to vary or to add any condition in the execution of the treaty, even when it may seem that such condition is advantageous to the other party.

**786.** International custom cannot alter or modify an express stipulation; but as to anything not the object of express declaration and of a formal provision of the treaty, it is presumed that the parties intended to comply with custom in the matter of its execution.

**787.** It must be held a fundamental principle of the law relating to treaties that none of the signatory parties may at will be deemed excused from executing it in good faith, in all its parts, owing to changed circumstances or to a possible eventual prejudice to its interests arising from its execution.

In principle, it must be observed that the possible injury and prejudice which may result from the execution of a treaty could not constitute a sufficient ground to justify a refusal to execute it by the state claiming to be injured. In matters of private interest and in civil contracts it may be admitted that an injury might, within certain limits, constitute a just ground for suspending the execution of a contract and for bringing an action for annulment. But, in international relations, if a state could, after having concluded a treaty, suspend its execution on its own authority, alleging possible injury and prejudice, it would be admitting a dangerous pretext for disregarding the faith due to treaties, based on their inviolability.

See Fiore, *Trattato di Diritto internazionale pubblico*, 4th ed., v. 2; *Inviolabilità dei trattati*, § 1030.

There may be exceptional cases in which, in consequence of supervening

events, the respect of the rule of inviolability of treaties might endanger the political and economic life of the state. Yet, even in such a case, we believe that the state cannot alone free itself from observance of the treaty, but should submit its case to a tribunal of arbitration or to a conference.

788. Should one of the parties declare a suspension or actually suspend the execution of a treaty which it had subscribed, the other contracting parties would also be justified in suspending its execution. Such a state of facts could only temporarily suspend the execution of the treaty, but would not imply its annulment or abrogation until the advisability of annulling the treaty had been agreed upon by the contracting parties themselves as a result of amicable negotiations, or until the demand of the party requesting its abrogation had been recognized as well founded in law by a tribunal of arbitration or a conference, after duly hearing the other party which insists on its maintenance and execution.

#### LAWFUL MEANS OF ASSURING THE EXECUTION OF TREATIES

789. Parties may, by express undertakings, guarantee the execution of obligations contracted, assuring their execution through real guaranties or means lawful according to international law.

790. A right given to one of the contracting parties to occupy a portion of the territory until after fulfillment of the obligations contracted must be considered as one of the lawful forms of real guaranty to assure the execution of a treaty.

It is also permissible to furnish security to insure the payment of a certain sum undertaken to be paid, or to provide for the intervention of a third power as guarantor.

Other means of security may also be adopted, provided they are not contrary to the general principles of international law.

791. It may be considered lawful for the parties to provide for a penalty clause in case of non-fulfillment of the obligation. But matters which cannot constitute the object of a lawful international convention cannot be stipulated as a penal clause in case of non-execution.

#### GUARANTY OF A THIRD POWER

792. A third state cannot be held as guarantor of an assumed obligation, except by virtue of an explicit, certain stipulation accepted in the form established for the conclusion of treaties.

The obligation of guaranty cannot be inferred from the simple fact that the state acted as mediator in the negotiations.

**793.** If the guaranty has been explicitly assented to and has not been limited to certain specific obligations assumed in the treaty it should be regarded as given and accepted for the fulfillment of all obligations incurred in the treaty.

#### OBLIGATIONS ARISING OUT OF A GUARANTY

**794.** A state guaranteeing the obligations assumed by another state in a treaty is bound, when so required, to assist in compelling the other party to execute the treaty through means permitted by international law. It is not bound to repair any damage caused to the other state which relied upon its guaranty if, having done everything in its power, without prejudice to its own rights, it failed to secure the proper execution of the treaty.

**795.** The guaranteeing state is not bound to give what the original debtor state has promised but failed to give, except in the case of payment of a certain sum of money for which it has given security by express declaration, or for which it has made itself surety.

**796.** The guaranteeing state is not permitted to use the coercive measures allowed by international law, in order forcibly to compel both parties to execute the treaty, except where that state has an actual interest, based on the ground that non-execution will inflict a real and effective injury upon its own rights.

#### INTERPRETATION OF TREATIES

**797.** Interpretation of a treaty is necessary:

(a) When the words used in drafting the stipulations between the parties have not a clearly determined meaning, and do not, therefore, express a clear and exact concept.

(b) When the wording, while clear in itself, does not render precisely and exactly the idea of the parties.

(c) When the general provisions of the treaty are not definitely applicable to a particular case.

(d) When unexpected circumstances give rise to inconsistencies between the present state of affairs and the stipulations of the

treaty, or between the provisions of two treaties concluded between the same parties.

798. Interpretation may be *grammatical* or *logical*. The former may be necessary to determine the sense of obscure or badly drafted expressions. The latter serves to fix precisely the concept and extent of the reciprocal obligations assumed by the high contracting parties.

#### RULES OF GRAMMATICAL INTERPRETATION

799. There is no deed to interpret that which does not require interpretation.

800. The meaning of words used must be fixed and determined according to common usage, rather than according to elegant language with all literary niceties.

801. Every fault of construction or syntax must be eliminated, taking into account what precedes and what follows.

802. A word susceptible of different meanings may be considered as used sometimes with one meaning, sometimes with another, according to whether the meaning coincides with its use in a particular clause.

803. Technical expressions used in a treaty should be understood in their technical, rather than in their popular sense.

If, however, according to specialists, technical terms or words of art may have different meanings, one need not adhere strictly to general definitions, but the words used should be understood in the sense best adapted to the subject to which they refer.

804. There need be no subtle discussion on the true meaning of the words used to express an idea when, according to the intention of the parties, the meaning clearly appears. It should be considered captious cavil to adhere to the strict meaning of an expression in order to elude the true sense of the words, as deduced from the intention of the parties.

Puffendorff relates the case of Tamerlane who, having negotiated the surrender of a city and promised not to shed blood, caused the soldiers of the garrison to be buried alive. Such subtle cavil and others of the same category must be considered as gross and wretched subterfuges, which intensifies the culpability of the treachery.

805. Words which have a different legal meaning in each of the contracting states must be considered as used in the sense ascribed

to them in the state which, by the treaty, undertakes an obligation.

806. The meaning of obscure or equivocal expressions must be determined so as to make them agree with clear and unambiguous expressions used in the same act or in other acts concluded between the same parties.

It is reasonable to presume that parties which, in manifesting their will, have left some uncertainty as to the meaning of the words used to express it, have employed those words in the sense deducible clearly and without ambiguity from another agreement between them. There is no reason why it should not be conceded that the contracting parties have probably entertained the same thought as in other analogous cases.

#### RULES OF LOGICAL INTERPRETATION

807. When the stipulation does not present any ambiguity it may be interpreted so as to establish the intention of the parties and to fix precisely the extent of their respective obligations.

808. The substance of the obligation must be determined by recalling the thought and intention of the contracting parties, as appears from the context of the treaty, rather than by referring to the dead letter of the document (*in fide semper autem quid senseris, non quid dixeris cogitandum*).

809. Yet, the state which has clearly assumed an obligation cannot restrict its extent by invoking its unexpressed intention.

If it has not clearly expressed itself the clause under discussion should not be interpreted in its favor, but against it, for having failed clearly to express the obligation it intended to assume.

Compare L. 39, Dig. *De Pactis* (2, XIV): "*Pactionem obscuram, vel ambiguum, venditori, et qui locavit, nocere, in quorum fuit potestate legem apertius conscribere.*" Applying the proposed rule, it must be affirmed in principle that, in order to determine the substance of an obligation, the meaning deducible from the words used by the one assuming an undertaking or obligation must be considered as decisive. It is to be presumed, in fact, that whoever promises voluntarily to do or to furnish something should take the greatest care to use the most precise terms to express clearly what he promises. Therefore, should expressions used by an obligor present some ambiguity, it should be resolved by adhering to the sense of the words used in the promise, which must be considered as accepted by the promisee in the terms used by the promisor. We must, therefore, consider as true and absolute against the promisor what he has sufficiently declared.

810. None of the contracting parties may so interpret a stipulation as to draw undue advantage from it. The substance and ex-

tent of the assumed obligation must be understood in the sense most equitable and liberal to the respective interests of the contracting parties.

811. Clauses which are not capable of execution because they imply either a violation of principles of "common" law or a violation of general interests or an impracticable result, must be regarded as non-existing.

Treaty stipulations must be understood in the most equitable sense, and always so as to produce some useful effect and to avoid any derogation from "common" international law or the public law of the contracting parties.

812. The intention of the parties, when it comes to determine the substance and extent of each provision, must be deduced from the treaty as a whole, considered as indivisible and homogeneous.

813. We should avoid an interpretation which leads to absurdity; or one which renders the treaty null and void; or one which would lead to an invidious result, by making one of the contracting parties bear all of the burdens without any reciprocal obligations by the other.

814. The spirit of every provision must be sought in its moving reasons. Yet, the discussions relating to the stipulations of the treaty, as found in the proceedings and preparatory work leading to its conclusion, cannot serve to interpret the treaty so as to give it a meaning substantially different from its express stipulations, save when the negotiators themselves have drawn up and signed a protocol to determine the legal meaning and value of the agreement.

We may observe, to explain our rule, that what has been said by the plenipotentiaries in the course of the negotiations may be taken into consideration to explain the scope of a particular stipulation when it does not fully appear from the wording of the act. Nevertheless, it cannot be admitted that what the negotiators may have said *hinc et inde* and their reserved and unexpressed intentions may serve to weaken the juridical force of the written agreement. Supposing that the agreement be clear, express and not ambiguous, its force could not be weakened by the contracting parties, by relying upon verbal statements of the negotiators and on intentions in harmony with secret instructions. These secret intentions, as well as equivocal expressions used in the course of the negotiations, cannot serve to alter the legal force or import of a written document, properly drawn up and signed.

## BROAD OR RESTRICTIVE INTERPRETATION

815. On principle, it is not proper to give to a treaty a broad interpretation by application of the rules relating to the interpretation of statutes; it is necessary to conform to the intention of the contracting parties and to consider every provision applicable to the case which constituted the object of the agreement, apart from unforeseen cases.

816. It is not proper to proceed by analogy to give a broad interpretation to a provision in itself clear and explicit; it should, in fact, be considered as applying only to that which constituted the subject-matter of the treaty.

Analogy may be invoked when the provision lacks clearness and precision, and is, therefore, ambiguous. Ambiguity may be eliminated by referring to the stipulations of another treaty relating to analogous matters between the same parties.

817. Any provision tending to limit the free exercise of the rights of either of the two contracting parties must be understood in the most restrictive sense, like any other impairment of the liberty of persons under "common" law. Provisions entailing a burden must likewise be understood in a restrictive sense, when the words used do not clearly express what the party has engaged to undertake or do.

This rule is founded on the aphorism: *Odia restringi, favores conveni ampliari*, which itself is based on the presumption that a party who has accepted a restriction upon his natural liberty has intended to sacrifice as little as possible of that liberty, and to assume the least burdensome obligation, since the party in whose favor he has bound himself has not required of him an explicit and precise declaration determining the extent of his obligation.

## LEGAL INTERPRETATION OF A TREATY

818. It is incumbent upon parties which have concluded a treaty to adjust differences and doubts which arise as to its import. To this end, they may subscribe a declaration or protocol, which is then regarded as an integral part of the treaty.

819. The interpretation of the doubtful clauses of a treaty, made by declaration or protocol, will be regarded as legal and authentic whenever they fulfill the requirements for the validity of a convention between two states.

**820.** Whenever the contracting parties are unable to agree as to the interpretation of a treaty, the difficulty should be adjusted like any dispute involving individual interests between two states, and its interpretation should be submitted to the decision of a tribunal of arbitration.

**821.** The treaty, considered as a statute, may be interpreted by the courts when it is necessary to apply it in the interest of private persons. This interpretation, however, has merely the same effect as the interpretation of any other legislative provision. Therefore, it is only of value in the state in which the court sits. It has no influence on the interpretation of the treaty as a political act, save where expressly or tacitly accepted by the contracting parties.

In order fully to determine the import of the proposed rules it may be observed that any treaty, in so far as it establishes the respective rights of the contracting parties and the "common" law of their relations in regard to the subject-matter of their convention, is a political act. Therefore, since the interpretation of such a convention always involves the determination of the respective sovereign rights, it is evident that, in that respect, the treaty can be interpreted only by the contracting parties, and that, for the validity of the act, it is essential that the protocol of interpretation shall present the same intrinsic and extrinsic characteristics as any other convention between two states.

The treaty, however, may be considered as the law of the state promulgating it, and the courts that have to apply it within the domain of private and of public municipal law may interpret it as they interpret any statute adduced in private litigation.

Compare: French Court of Cassation, June 30, 1884 (*Journal du droit international privé*, 1885, p. 307); January 6, 1873 (*Dalloz*, 1873, I, 117); January 6, 1861 (*Journal du Palais*, 1861, 1149); Court of Cassation of Florence, July 3, 1874 (*Bettini*, XXVI, I, 866); Court of Cassation of Rome, June 12, 1895 (*La Legge*, XXVth year, § 2, p. 895).

[By article VI of the Constitution of the United States "all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding"—Transl.]

#### DISPUTES RELATING TO THE EXECUTION OF A TREATY

**822.** Every dispute relating to the execution of a treaty concerning special interests concluded between two or more states must be decided in accordance with the rules governing the solution of questions of a political nature, by reference to the applicable principles of international law.



**823.** It is incumbent on states concluding a treaty to make a stipulation of a reciprocal obligation to refer to a tribunal of arbitration any difficulties arising out of it, and to draw up, as the case may be, a *compromis* for the submission of a specific case to arbitrators.

**824.** The parties are bound to observe any rules laid down in the treaty concerning the constitution of the arbitral tribunal and the procedure to be followed. If no rules are provided, and yet the parties have agreed to submit differences to arbitral jurisdiction; they shall be considered as bound to observe the rules of "common law," both as regards the constitution of the tribunal and arbitral procedure.

**825.** The obligation to refer every difficulty relating to the execution of a treaty to arbitrators must be considered as based on the general principles of law, even when not expressly stipulated in the treaty. Consequently, in case of a controversy as to the execution of a treaty and of failure of diplomatic negotiations to adjust it, one of the parties always has the right to notify the other party of its intention to refer the question to the decision of a tribunal of arbitration, and if the latter declines to agree to the proposition, the notifying party may hold the other responsible for all the consequences which may result from the unavoidable severance of friendly relations between the two states.

**826.** Every difficulty relating to the execution of a treaty of general interest must be submitted to the decision of a Conference to be established and to operate in conformity with the rules laid down in the following book.

We believe it essential to distinguish between treaties of general interest and those of special interest to a few states, because we do not believe they can be subjected to the same rules. The distinction must be based on the subject-matter and purpose of the agreements. A treaty concluded between two or more states to regulate their special concerns, as for example, international literary and artistic copyright, international postal service, extradition of criminals, customs relations and maritime service, cannot be compared with a treaty relating to the navigation of international rivers, the suppression of the slave trade or to any other agreement concerning common interests. We concede that difficulties relating to the execution of either class of treaties should be adjusted through peaceful means; but, in our opinion, those relating to treaties of general interest, like those concerning treaties of particular interest, may be referred to arbitrators. Yet, with respect to the former class of treaties a certain peaceful collective intervention cannot be excluded; hence we hold that difficulties relating thereto ought to be referred to the Conference, whose organization and operation will be set forth below.

## TITLE IV

### ABROGATION AND ANNULMENT OF TREATIES

#### GENERAL PRINCIPLES

**827.** Every treaty may be abrogated, either in whole or in part, by agreement of the states concluding it, or by a renunciation of its benefits on the part of the state profiting by it.

There are numerous instances of conventional abrogation of obligations arising out of a treaty. The provision of article 5 of the treaty concluded at Prague between Prussia and Austria, August 23, 1866, was abrogated by the treaty signed between the same states at Vienna, October 11, 1878. Under that article of the Treaty of Prague, Austria renounced all the rights that were granted her over the duchies of Schleswig and Holstein by the Treaty of Vienna of October 30, 1864, and transferred her rights to Prussia, reserving to the people of North Schleswig the right to unite with Denmark, if by a vote freely expressed, they manifested this desire. Owing to the abrogation of that article by the agreement of 1878 the plebiscite was not required.

**828.** None of the contracting parties may on its own authority consider the treaty as abrogated either as a whole or in part, or suspend its execution, but must deem itself bound to observe it in all its parts until abrogation has been legally pronounced by a competent tribunal. If, however, one of the parties should suspend the execution of the treaty without evoking any protest from interested states, from which acquiescence may be presumed, the treaty ought to be considered as annulled by reciprocal tacit consent.

**829.** A party which has sufficient grounds to consider the abrogation of a treaty as justified, may suspend its execution and denounce it, notifying the interested parties, through diplomatic channels, of its asserted right to terminate the treaty. The abrogation, however, shall not be considered as having legally taken place except through a formal agreement of the interested parties, or the decision of a competent court.

After the fall of the Second Empire, the Russian Government in October, 1870, informed the signatory powers of the treaty of Paris of 1856, that,

owing to the violation of the stipulations relating to the neutrality of the Black Sea, Russia considered itself released from the restrictions upon the right to have a fleet in that sea, and invited them to meet in conference in order to amend the clauses of the treaty.

Nevertheless, the abrogation of those stipulations could not be deemed to have been legally effected until, as a result of the London Conference, the treaty of March 13, 1871 abrogated articles 11, 13 and 14 of the Treaty of Paris.

**830.** Unilateral denunciation may be effectual in annulling a treaty only when the right is recognized in the treaty and it is carried out in the terms and cases provided therein and in the forms established by "common" law.

#### JUDICIAL PROCEEDINGS FOR THE ABROGATION OF A TREATY

**831.** The abrogation of a treaty ought to be pronounced by a competent court, at the formal instance of a signatory party.

**832.** The right of a party to request the annulment of a treaty must be considered as well founded, when it is proved and recognized that the treaty lacks one of the essential conditions required by international law for its validity.

Compare rules 747 *et seq.*

**833.** Prejudice to the interests of a signatory power arising out of the execution of a treaty cannot be deemed a sufficient ground to request its annulment.

Even when a state has imprudently concluded a treaty without full knowledge of the case, it must be bound to bear the consequences and is not warranted in requesting its annulment on the ground of prejudice to its interests.

Even if, owing to a change of circumstances, the state suffers grave injury by reason of the execution of the treaty, it cannot on that ground refuse to execute it. If it were ever to be admitted that a state could cancel its obligations when it considered the treaty as disadvantageous, what would become of the good faith due to agreements and the inviolability of international treaties? Private law has admitted the rescission of contracts on the ground of injury because they involve only private interests, whereas treaties involve public and international interests and the maintenance of their inviolability constitutes the highest international interest.

Compare rule 787.

**834.** No state may base its right to regard a treaty as annulled on the ground that circumstances have so changed that, had they existed at the time the treaty was concluded, they would have constituted a serious impediment to the giving of its consent, essential to the conclusion of the agreement.

It is contended that every convention must be subordinated to the clause *rebus sic stantibus*. Admitting this conception in a general and indefinite sense, it would follow that the termination of a treaty could be brought about by the unilateral conclusions of one of the parties as to unexpected changes in the state of fact existing at the time the treaty was concluded. In fact, by accepting the rule without reservation, each of the contracting parties would be considered as warranted in freeing itself from its obligations by alleging a change of the state of affairs existing at the time when it had decided to bind itself. It may be admitted that a change in such state of affairs might constitute a sufficient motive for requesting the annulment of the treaty by a competent court, leaving it to that court to decide whether, considering the serious prejudice likely to arise from the fulfillment of the obligations of the treaty, it should be revoked as inoperative by reason of changed circumstances. But, so long as the court has not passed upon the request for annulment presented by the interested party, the rule of inviolability must prevail absolutely.

Compare the protocol of January 17, 1871, signed by the plenipotentiaries at the conference of London (Martens, *Nowv. recueil général*, XVIII, p. 278).

**835.** When a treaty, however, has been concluded with a view to conditions which afterwards come to be materially changed, so that the object of the convention may be considered as having completely disappeared, the treaty ought to be annulled by a competent authority, after establishing the absence of any reason for the continuance of the obligation.

This rule is based on the just view that when a state of facts which constituted the principal and substantial object of an agreement happens later to be completely changed, the treaty, although valid at the time of its conclusion, subsequently loses its *raison d'être*, since it must be considered as lacking in object and in basic reason. Therefore, the idea of this rule is quite different from that on which the preceding rule is based. In fact, assuming that the treaty is concluded to regulate a certain predetermined condition, which constituted the principal and substantial object of the agreement, it is reasonable to admit that when the continuance of the condition assumes the actual character of a tacit *sine quâ non*, the absence or removal of the condition renders the agreement without object, and the treaty, consequently, without legal effect.

Compare Rule 874.

**836.** A change in the political constitution of either of the contracting states, cannot *ipso facto* be deemed a sufficient ground for annulling a treaty, except when its execution may be considered incompatible with the new constitution of the state.

Changes in the political constitution of a state do not affect its personality (compare Rules 101, 183, 776). Therefore, the obligations assumed by the state must subsist in the same way as do the rights which it possesses.

**837.** When, by reason of a change in the political constitution of a state, certain clauses of a treaty become impossible of

fulfillment, their abrogation could be effected by agreement between the parties because of established impossibility of fulfillment, if it were desired to continue in force the remainder of the treaty.

In the absence of such an agreement, the interested party could suspend the execution of the treaty, which, since it must be regarded as an indivisible whole, could not be fully executed, and if the other contracting party does not consent, the dispute arising out of its suspension ought to be referred to a tribunal of arbitration, which should first of all decide whether in effect the fulfillment of all the obligations assumed under the treaty is incompatible with the new political constitution of the state, and then determine the effects of the inconsistency, that is, whether the partial annulment of the incompatible agreement should be decreed, while maintaining the rest of the treaty in force, or whether the entire treaty should be held to be terminated.

838. When, in order to carry a treaty into effect, one of the contracting parties is required to take certain legislative action and the government of the state so obligated has failed to provide or was unable to obtain from the legislature the necessary legislation to carry out its obligations under the treaty, the other contracting party has the right to suspend the execution of the treaty until the legislative measures have been enacted, and may move the annulment of the treaty for non-execution by the other state.

In such a case, the international responsibility of the state which has assumed obligations it could not meet, remains complete.

Except where the impossibility of execution arises out of the political constitution of the state, when rule 763 must be applied, the enactment of legislation required for the execution of a treaty, which the government has undertaken to enact (when it has not clearly conditioned its obligations under the treaty to the anticipated legislation, so as to make the legislation a suspensive condition), must be deemed a matter of municipal law, that can have no influence whatever on the legal force of the treaty as an international obligation of the state. Therefore, its responsibility always exists, owing to the fact that it has assumed an obligation without being certain of overcoming the obstacles necessary to carry it into effect.

839. If a treaty concluded between two or more states should be incompatible with another treaty concluded by one of the contracting parties with a third power, the latter could demand of its co-contractor the abrogation of the later treaty, which would impair rights previously acquired.

When the parties are unable to agree, the difficulty ought to be submitted to the judgment of a tribunal of arbitration, and if that tribunal should recognize the complaint of the third power as well founded it should decree the later treaty to be inoperative, so far as that power is concerned. This would give rise to the responsibility of the state in its relations with the other contracting party for having undertaken an obligation that it certainly knew it could not assume. It would be necessary then to apply the rules relating to the international responsibility of the state, which by its own act has violated the rights of others.

In order to explain this rule fully, it should be recalled that a violation of the rights of others cannot lawfully constitute the object of an obligation. Thus, in the relations of the state obligated to the third power, if the latter wishes to maintain intact all rights previously acquired, the treaty should be declared null and void in order to maintain undisturbed previously vested rights. But, in the relations of that state with the other parties, the treaty could subsist notwithstanding the opposition of the third power, for the reason that the prior treaty with the third power must be deemed *res inter alios acta* with respect to the other contracting parties.

The case would be quite different, should the treaty imply in itself a violation of the rights of a third power according to international law. In such case, the treaty would be invalid as to all the parties, owing to the fact that the violation of the rights of third parties cannot lawfully be the subject-matter of a convention.

Let us suppose, for example, that a treaty for a customs union was concluded between states A, B, C and D; that state B had previously concluded another customs treaty with state X, and that the obligations it has assumed in the treaty for a customs union imply a violation of the rights already acquired by state X. In that circumstance, the treaty for a customs union would subsist with respect to states A, C and D, and could be declared inoperative only with respect to state B, for which state the violation of the rights already acquired by state X under the previous treaty, could not constitute the lawful subject-matter of a convention. The result would be that state B could not be a member of the customs union, and would incur international responsibility towards states A, C and D, in case the customs union concluded between them and State B had provided for pecuniary benefits.

#### TERMINATION AND RENEWAL OF TREATIES

840. When, in a treaty, it has been formally agreed that at the expiration of the stated term, the treaty will be deemed to continue from year to year, or for a longer period, if either of the parties should fail to declare its intention to terminate it, the treaty must be considered in force until officially denounced within the period and according to the forms stipulated.

**841.** The party desiring to exercise its right to denounce a treaty must do so through diplomatic channels within the period agreed upon. The other party may similarly denounce it. But, even in the absence of such formality, the treaty would cease to be in force by reason of the act of denunciation legally notified.

**842.** If, in the treaty, an obligatory term has been stipulated, without a clause providing for tacit termination in default of denunciation, and should the parties, after the contractual period has expired, continue reciprocally to observe their obligations, the treaty should be considered as tacitly renewed, when the reciprocal observance of the treaty is proved in a formal, explicit and unequivocal manner, and is such as to establish clearly the reciprocal intention of maintaining the treaty in force after the expiration of the contractual period.

**843.** The intention of the contracting parties to maintain the treaty in force after the expiration of the contractual period cannot be considered to arise from the observance of certain rules of "common" law, which happened, however, to be recognized in the treaty.

Compare the case discussed before the French Court of Cassation in connection with the tacit renewal of consular conventions between France and the United States and the motion of Public Prosecutor Dupin, Cass., July 24, 1861 (*Journal du Palais*, 1861, p. 1149).

#### EXPIRATION OF TREATIES

**844.** Treaties expire legally:

- (a) By reciprocal consent of the contracting parties;
- (b) By performance of the obligation contemplated;
- (c) By the expiration of the term fixed in the treaty, when not continued by the parties;
- (d) By the express renunciation of the state which is alone interested in maintaining the treaty in force;
- (e) By the fulfillment of a condition subsequent;
- (f) By the complete disappearance, fortuitous and nonculpable, of the circumstances which constituted the object of the convention.

**845.** All treaties do not expire *ipso jure ipsoque facto*, by reason of war between the contracting states, although they cease to be operative. All conventions between the two states, however in-

compatible with a state of war, must be deemed suspended *ipso jure ipsoque facto* when war breaks out.

The principle maintained by some publicists that, unless there is a formal stipulation to the contrary, treaties expire in consequence of a declaration of war which suspends and destroys all their effects (see Calvo, *Droit internat.*, 4th ed., § 362) does not seem to us consistent with the principles of modern law, which tend to restrict the effects of war to the relations between state and state. All treaties certainly cannot be considered as utterly extinguished on account of war.

Compare: Rule 859, and Fiore, *Trattato di diritto internazionale pubblico*, 4th ed., v. 3. . . .



## TITLE V

### SPECIAL TREATIES

**846.** Special treaties may be as numerous as are the matters that may form the subject of international relations and of the agreement of states in matters of reciprocal interest.

It seems unnecessary to classify treaties and we may refer to our work: *Diritto internazionale pubblico*, v. 2, § 1008. At the present time, especially, when international relations between states have considerably extended and the necessity to regulate them through conventions and treaties has consequently increased, it may be said with reason that the enumeration would be long, and it does not seem to us necessary to make it here.

**847.** Every treaty should be characterized by its object and content, rather than by the name chosen by the parties.

This rule is based on the wise maxim: *plus valet quod agitur quam quod simulatur concipitur*. It may happen that two states have, for example, denominated as a treaty of customs union a convention concluded to regulate trade. Since the stipulations of the treaty show that the convention has not the nature, characteristics and conditions of a treaty of customs union, it cannot be considered such merely because the parties have so named it. If it were proved that the convention was substantially a treaty of commerce, it would be operative as such with respect to other states parties to a treaty of commerce, should they be entitled to the treatment of the most favored nation.

Sometimes, also, the title "treaty of commerce" is given to a convention which, besides stipulations relating to trade, contains clauses concerning literary copyright or patent and trade-mark protection, the institution of consulates and the extradition of criminals. It is the subject-matter and not the name of a treaty which controls its functions, operation and status.

**848.** A special treaty must be judged, executed and interpreted, not only in accordance with the general rules governing all treaties, but also in conformity with those which relate to its special nature and particular subject.

### TREATIES OF CESSION

**849.** A treaty of cession is a treaty by which a state cedes to another state a portion of the territory that it owns, by renouncing its rights of sovereignty over it.

Provided it be legally concluded and satisfies all the requirements of validity, such a treaty results in a loss of the rights of sovereignty over the territory ceded by the ceding state and the acquisition of the same rights by the transferee state (see rules 147 and *et seq.*)

A treaty of cession does not become operative at the time of the stipulation, but at the time the ceded territory is taken over.

Compare rule 150.

We must, therefore, admit that if the transferee power should fail to exercise its rights for a considerable time, the treaty of cession might be considered inoperative, on the ground of tacit renunciation on the part of the transferee. It is true that, in international law, there is no rule relating to extinctive prescription, as is the case in positive civil law; but we must admit, under general principles, that he who fails, for a long period of time, to claim his rights, must be regarded as having renounced them. As some form of taking possession of the ceded territory must be deemed essential to make a treaty of cession operative, it is reasonable to concede that, if the transferee should fail to take possession of the said territory and should allow a great many years to pass (30 or 50, for example), without availing itself of its rights, it should be proper to claim extinctive prescription.

**850.** No peaceful treaty of voluntary cession of a portion of territory can be considered valid unless it has been concluded by those authorized thereto by the constitutional laws of the ceding country and in conformity with the forms required under public municipal and international law (see rules 751, 759).

**851.** The effects of a treaty of cession, either so far as they modify the exercise of the respective rights of sovereignty, or so far as the rights of private persons are concerned, must be determined in conformity with the rules relating to cession and annexation.

See the rules laid down in Book I, §§ 154 *et seq.*

**852.** Leaving aside the question of the right of every victor to condition the conclusion of peace upon the cession of a portion of territory, and the question of the advisability of profiting by the fortunes of war and of imposing that condition on the vanquished, treaties of forced territorial cession lawfully concluded (conformably to the principles of rule 850) must be deemed valid between the contracting parties, if the general rules of international law relating to the validity of treaties have been observed.

#### TREATIES OF COMMERCE

**853.** The main object of commercial treaties must be to regulate commercial relations between the contracting parties for the

purpose of protecting, extending and developing the freedom of commerce.

**854.** States should conclude treaties of commerce in order to facilitate exchanges, to overcome obstacles which hinder the free movement of the products of the soil and industry and to protect the freedom of competition, rather than to organize, directly or indirectly, a protective system or to establish, in the interest of the Treasury, any form whatever of restriction upon the freedom of commerce.

**855.** Commercial treaties must be based on the most complete equality of treatment so as to assure equivalent and proportionately equal advantages to the contracting states and their citizens, without either of the parties taking advantage of its preponderance and greater power to compel the other, weaker or less powerful, to accede to less favorable or more onerous conditions.

**856.** States may regulate, through a treaty of commerce, all matters concerning their international relations, but the proper object of these conventions is to regulate importation and exportation, the transit, transfer, and deposit of merchandise, customs tariffs, navigation dues, quarantine, coastwise trade, fishing and other commercial acts.

**857.** Each state should conclude commercial treaties with the greatest possible number of states, so as to extend the freedom of international exchanges and to promote reciprocal interest as much as possible by developing competition.

The foregoing rules seek to introduce in practice the principles advocated by modern science, namely, that the reciprocal interest of all the states seeking to assure the development of the different factors of national wealth consists in multiplying international exchanges as much as possible and in promoting competition. Without competition, national industry cannot thrive; it remains stationary, and if industry were not stimulated and encouraged by competition to greater productivity, there would be no stimulus to labor, the principal factor of national prosperity, and the increase of capital essential to the development of agriculture, industry and commerce. It is certain that in order to meet the movement of international exchanges and foreign competition, it is indispensable to improve and encourage national industry. That must be the task of each government. Nevertheless, it is evident that public prosperity and national wealth could not be achieved and increase without the development of all the contributing factors, and that such development is bound up with the laws governing freedom of production, commerce, competition and international exchanges. Each government must improve the agriculture and industry of its country, in order that it may be able to hold its

own in the struggle with foreign competition and international exchanges; and therein lies the secret of public prosperity.

**858.** Treaties of commerce must be executed with the most scrupulous integrity and good faith. Governments must examine and weigh carefully the obligations they are about to assume in a convention of this kind and absolutely avoid recourse to any subterfuge to evade the faithful execution of its stipulations.

#### INTERPRETATION OF TREATIES OF COMMERCE

**859.** Treaties of commerce must be interpreted according to their purpose and the intention of the parties.

They must be considered as concluded mainly to regulate commercial intercourse and cultivate amicable relations between the contracting parties, and must be regarded as completely suspended when war breaks out, provided there is no clause to the contrary in the treaty expressly declaring that certain clauses are to apply in time of war.

Since it is generally admitted that war does not annul *ipso jure ipsoque facto* treaties concluded before the declaration of war, but only suspends the operation of those inconsistent with war, it follows that treaties of commerce and navigation and those concerning certain customs relations and others of like nature, while they cannot be deemed null and void, must be regarded as suspended in their operation by reason of the war. Still, it is necessary to bear in mind that in certain commercial treaties, as in that between the United States and Italy of 1871, certain articles, and especially articles 12 to 21, have no application in time of peace, but only apply when war breaks out between the two countries. As regards private rights governed by treaties, it may be said, in principle, that even though they must be regarded as suspended whenever their exercise happens to be connected with sovereign rights, a different rule must, nevertheless, be followed in certain cases. Thus, for example, it might be said (when so stipulated in the agreement) that judgments rendered by the respective courts are to be executed. In such case it could not be maintained that this could be continued notwithstanding the war, owing to the fact that the right of sovereignty is at stake jointly with the right of individuals. On the other hand, copyright rights regulated by treaty should be respected notwithstanding the state of war. This applies also to treaties concerning exclusively the exercise and enjoyment of private rights. Nowadays, especially since war is admitted, with more reason, to be a relation between states and that individuals in the exercise of their rights should not be involved in the relations between states, the supreme rule in deciding the matter may be found in this principle.

## TREATMENT OF THE MOST FAVORED NATION

**860.** A reciprocal most-favored-nation clause in a treaty implies the right of one of the parties to enjoy any favor whatever granted by the other party, by treaty, to a third power.

[This represents the usual continental view. The position of the United States has been that privileges extended in a treaty in return for reciprocal advantages cannot be claimed gratuitously by another power under a most-favored-nation clause, but must rest upon a grant of equivalent benefits to the United States.—See Moore, *Digest of International Law*, v. 5, § 765.—Transl.]

**861.** The right to enjoy the treatment of the most favored nation is, in principle, conditioned upon the treaty with the third power being still in force. It must, therefore, be deemed extinguished by reason of the expiration of the final term stipulated in the treaty with the third power, and cannot be operative beyond the term stipulated in the most-favored-nation treaty itself.

It is evident that, as the advantages and favors granted by the clause cannot be extended, neither can the term be extended, since it must be considered as an integral element of the thing enjoyed.

**862.** When the state which has stipulated for most-favored-nation treatment claims its privilege by formally notifying the other party, through diplomatic channels, that it considers itself entitled to a more favorable concession granted to a third power, and the other party has expressly acknowledged the claim, the right so acquired under the clause will be regarded as fully vested and will subsist until the expiration of the treaty between the parties, of which the right thus formally acquired is to be considered an integral part.

**863.** When the express declaration of intention to take advantage of the right of most favored treatment has not been made through diplomatic channels, as stated in the foregoing rule, we must hold as ineffectual any tardy declaration made after the treaty executed with the more favored third power has expired, and the more favorable treatment will have to be considered as having ceased from the day when the treaty with the third power went out of force.

Treaties concluded with third powers cannot, in principle, grant the enjoyment of any right, except when the parties have agreed that one of them could avail itself of the more favorable advantages granted by the other to a third power and could claim the same rights. As to it, it is evident that since the right arises from the more favorable treatment of the third power,

it can only subsist so long as the treaty of which the claiming state desires to avail itself exists. Therefore, if that treaty has expired, the right to invoke its enjoyment must be likewise considered as having lapsed. This is a case where we may apply the maxim: *Conventio omnis intelligitur rebus sic stantibus*. A party may claim the enjoyment of a privilege so long as it is granted to a third power. It could not, however, take advantage of a privilege that no longer exists.

The case seems to us quite different where an express declaration is made by a party which notifies the other that it considers itself entitled to a privileged right under the most-favored-nation clause of a treaty. In such a case it exercises its own right in considering itself as the grantee of the concession of the more favorable treatment extended to the third power, and the right so acquired becomes the complement of the right arising from the treaty concluded with its co-contracting party. Therefore, that party could no longer limit the enjoyment of the right to the term fixed for the expiration of the treaty concluded with the third power. It would suffice, indeed, if the claiming party based its right on the most-favored-nation clause of the treaty and its express and duly notified declaration that it intended taking advantage of the more favorable concession made to a third power. Having thus acquired *jure proprio* the right to enjoy that concession, the right thus formally acquired should be considered independent of the concomitant existence of the treaty with the third power, which would merely serve to determine the extent of the more favorable treatment without regard to the length of time of its enjoyment.

**864.** The general clause extending most-favored-nation treatment cannot be invoked to claim the enjoyment of any privilege whatsoever granted to a third power, under any kind of treaty concluded with that power, but must be considered as limited to the treaties which have the same object and purpose.

The stipulations of treaties of commerce must be interpreted by taking into account the object and purpose of the treaty and the intention of the parties; such must be the case especially as regards the clause, often inserted, under which one of the parties has the right to enjoy the advantages that are or shall be granted by the other to the most favored nation. If, for instance, a treaty be concluded with a third power, in which other matters foreign to commerce were provided for, e. g., the transfer of successions in its relation with the applicable law, or liquidation in case of bankruptcy, etc., it could not be claimed, in our opinion, that such provisions, undoubtedly foreign to commerce, ought to be enjoyed by the other state under the most-favored-nation clause embodied in a treaty of commerce. The import and extent of such a clause, like those of any treaty stipulation, must be determined by the object and purpose of the treaty.

#### UTILITY OF TREATIES OF COMMERCE

**865.** Treaties of commerce, save for express provision to the contrary, extend to all the possessions of the contracting states at the time of the conclusion of the treaty.

With respect to possessions subsequently acquired by the state, the rules hereinbefore laid down relating to annexation are applicable.

**866.** A treaty of commerce, although duly concluded, becomes operative between the contracting parties only after its ratification in conformity with the constitutional law of the respective states and after the exchange of ratifications.

It must be considered in force until the expiration of the term fixed therein, unless its duration is extended by express or tacit consent of the parties themselves. In that case, it will be held to be reciprocally binding until either party has notified the other through diplomatic channels of its intention to terminate it, fixing the day on which it shall be considered abrogated.

#### TREATIES OF CUSTOMS UNION

**867.** The purpose of treaties of customs union is to establish between the states organized as a union the right of free exchange of products, without subjecting their respective citizens to the payment of customs duties at the frontier.

The result of these treaties is, with respect to the collection of the respective customs duties, to suppress the effect of boundaries between the states of the union.

Customs unions aim to consolidate the economic interests of the peoples who are members thereof, and thus to prepare gradually for their political union. The most striking instance is found in the present political union of the states of Germany, which was the final outcome of the *Zollverein* (German Customs Union). This union, initiated by Prussia in 1828, was successively enlarged with admirable perseverance by consolidating the economic interests of the different states of Germany associated with the intention of preparing and bringing about their political union, as happened after the events of 1866 and 1870.

Compare: Funck-Brentano and Sorel, *Précis du droit des gens*, pp. 158 to 174, on the political consequences of the customs union; Richelot, *L'association douanière allemande*; and Bonfilis, 3d ed., where in a foot-note under § 919, numerous works on the subject are cited.

#### CONSULAR CONVENTIONS

**868.** The purpose of consular conventions is to establish consulates by common agreement in the countries parties thereto, and to determine the rights, attributes, functions and prerogatives

of the respective consuls and their relations with the territorial law and authorities in the exercise of consular rights.

869. It is the duty of states to extend the conclusion of consular treaties as much as possible for the protection of their citizens residing abroad and to assist them in carrying on and developing trade and commerce.

870. Consular treaties must be considered especially useful and desirable when they improve the organization or operation of the consular establishment.

For the determination of these functions and relations, compare rules 495-529.

#### CAPITULATIONS

871. The object of Capitulations is to determine and to regulate the relations between civilized and uncivilized states, as regards the exercise of their respective sovereign rights with respect to the citizens of civilized states who reside in the countries where Capitulations are in force; to regulate the administration of civil and criminal justice with respect to these citizens; and to determine the prerogatives and privileges of diplomatic and consular agents and their special functions.

872. In principle, Capitulations are derogatory to the local "common" law; they are based on the inferior state of civilization of certain states of Africa, Asia and other barbarous regions, which makes it impracticable to exercise sovereign rights mutually and reciprocally with perfect equality of legal condition.

873. Capitulations must be considered as concluded for an indeterminate period, and held binding in their derogations from "common" law until revoked by reciprocal consent of the states between which they are in force.

In the countries where Capitulations are in force, it is necessary not only to apply their provisions but also to observe the rules arising from custom established by a constant practice in the exercise of the functions assigned to the respective authorities.

The first Capitulation dates back to February, 1535, and was obtained by Francis I from Soliman the Magnificent. See, for the history of Capitulations and of the conventions successively concluded and renewed: Féraud-Giraud, *De la juridiction française dans les Echelles du Levant et de Barberie et les justices mixtes dans les pays hors chrétienté*; Benoit, *Etude sur les capitulations entre l'empire Ottoman et la France*, Paris, 1890; Pradier-Fodéré, *La question*



*des capitulations en Orient*, *Revue de droit international*, 1869, p. 118; Bonfile, *Manuel du droit international public*, p. 423; Contuzzi, *Il diritto internazionale nella sua applicabilità in Oriente*; Olivi Luigi, under the word *Capitolazioni*, in the *Digesto Italiano*.

At the present time, besides the Ottoman Empire, Capitulations are in force in other oriental states.

The countries where Italian consuls exercise civil and criminal jurisdiction under Capitulations are:

China—(See, for jurisdiction in criminal matters, the treaty of October 25, 1866, art. 26).

Corea—(Treaty of June 26, 1884) art. 3.

Morocco—(Treaty of June 30, 1825; treaty of Madrid of July 3, 1880, and General Act of Algeciras of April 7, 1906, Ch. II and V.)

Persia—(Treaty of September 26, 1862, art. 5.)

Siam—(Treaty of April 8, 1905, art. 3.)

Turkey, for all its provinces and dependencies. In Turkey, Italian consulates are established in Europe proper, at Constantinople; at Canea, for the whole territory of the Island of Crete; at Philippopoli and Sofia, for Bulgaria; at Janina, Salonika, Scutari, and Uskub. For Turkey in Asia, they are located at Aleppo; for Syria, at Beirut, Damascus and Jerusalem, Smyrna and Trebizond. For the Turkish provinces of Africa, they are established at Bengazi, at Tripoli [before the Italian occupation] at Alexandria in Egypt, Cairo and Port Said. See for Egypt the protocol of January 23, 1875, and the judicial regulations annexed thereto, and for the other provinces, the treaty of July 10, 1861, article I, and the treaty of Berlin of July 13, 1878, articles 8 and 20.

See for the changes which have occurred in the system of Capitulations in Egypt, Algeria, Tripoli, Morocco, Madagascar, etc., A. Mérignac, *Traité de droit public international*, pp. 91 *et seq.*, and the authors cited by him, pp. 66 and 67.

[Turkey, by unilateral notification to the Powers shortly after the outbreak of the European War of 1914, undertook to terminate the Turkish Capitulations. The United States, and some other powers, have not acquiesced in this attempt of Turkey to rid itself of the serious encroachment upon national sovereignty imposed by the Capitulations; its success will possibly depend considerably upon the outcome of the European War—Transl.]

**874.** Although concluded for an indeterminate period, Capitulations should not be maintained in force after the state of affairs upon which they were brought into existence has ceased to exist.

In that event, the Capitulations may be revoked by reciprocal consent of the parties. In the absence of such agreement, the state where the Capitulations are in force has the right to annul them and to demand their revocation before a competent international court.

This rule is founded on the principle of the tacit condition precedent which is the foundation of conventional law (see Rule 835). When the presupposed fact, which presents the characteristics stated in rule 835, and constitutes the main object of the convention happens to disappear, the convention must be

annulled. The presupposed fact which legitimates Capitulations is the absence of legal guaranties, due to a lack of civilization, which makes it indispensable, for the security of persons and property and for the administration of civil and criminal justice, to apply the international system of Capitulations, according to which, in derogation from local law, the exercise of the power of jurisdiction is granted to the state to which the persons are attached, either as citizens or dependents. Now, when the presupposed fact, lack of civilization, disappears in a given country, the Capitulations no longer have any *raison d'être*. This was observed, with reference to Japan, which was still under the system of Capitulations, in our second edition, 1898 (rule 748). That country, having made great progress toward raising itself to the level of the civilized states of Europe, was justified in bringing about the revocation of the Capitulations. At present, that right is extended to Japan by all civilized states.

The same thing occurred in the Christian countries which formerly were part of the Ottoman Empire, where Capitulations ceased to be in force when they were recognized as independent states by the treaty of Berlin of July 13, 1878.

#### TREATY OF PROTECTORATE

**875.** A treaty of protectorate is one by which a weak or uncivilized state, which assumes the condition of a protected state, and a powerful state, which assumes the position of a protecting state, establish by common agreement the conventional limitations upon the exercise of their respective rights of sovereignty in international relations.

**876.** Whether concluded by voluntary request of one of the parties or imposed by force, the treaty of protectorate can be valid only when there exists the freedom of consent required for the validity of treaties.

It is valid in regard to third powers only after diplomatic notification and when not opposed by any of the powers, in which case it becomes effective from the day of its notification.

Compare Arts. 34 and 35 of the Treaty of Berlin of February 26, 1885.

**877.** The treaty of protectorate can be effective only if the limitations upon the exercise of the rights of sovereignty are determined in a certain and unequivocal manner. Like any convention limiting the free exercise of the rights of sovereign states, it must be strictly interpreted and in the sense least unfavorable to the liberty of the protected state.

In every doubtful case, the rules relating to the interpretation of the limitations upon the liberty of persons must be applied.

**878.** The limitation upon the exercise of the rights of sovereignty established through a protectorate may be applied only

to rights concerning the international personality of the protected state, that is, the capacity to conclude treaties, to assume international obligations, to maintain diplomatic relations in its own name, and do any other act manifesting the international personality of the state.

879. No treaty establishing a protectorate can validly seek to impose any form of political, economic or administrative dependency on the protected state, which implies a limitation of its internal sovereignty by placing it in the condition of a semi-sovereign state, thus constituting a relation of vassalage with the intention of effecting the conquest, submission and annexation of the protected state.

A protectorate properly speaking should have for its object protection, defense and assistance on the part of the protecting state, in order to encourage the development of civilization in the protected state and to represent that state in its relations with other states. A treaty establishing a protectorate, strictly speaking, may merely modify the international personality of the protected state, leaving its sovereign free and autonomous in the exercise of his functions within. On the contrary, when the protected state is subject to the suzerainty of and political dependency upon the protecting state, the protectorate serves merely to cover the annexation and subjection of the protected country.

The relations established by the treaty of December 17, 1885, between the French Republic and the Queen of Madagascar were always given the name of protectorate; but the final outcome sanctioned by the law of August 6, 1896, which declared the island of Madagascar and the dependent islands to be French, shows what the true character of the French protectorate was.

See, on the question of protectorates: Despagnet, *Essai sur les protectorats*; Wilhelm, *Théorie juridique des protectorats*, in *Journal du droit international privé*, 1890, p. 204; Pic, *Influence de l'établissement d'un protectorat*, in *Revue générale de droit international public*, 1896, p. 613, and the works cited in the notes; Catellani, *Nota critica sugli ultimi studi sul protettorato in Rivista italiana per le scienze giuridiche*, v. XXIII, fasc. I, and the authors cited by him; Fiore, *Diritto internazionale pubblico*, 4th ed., *Del protettorato coloniale*, v. 2, p. 620; Oppenheim, *International law*, I, § 92.

880. A treaty establishing a protectorate, when properly concluded, modifies the political constitution of the protected state, in the sense that it modifies its international personality.

The consequences of a protectorate relation upon the modifications in the powers and functions of the state in its relations with foreign governments should be subject to the rules that apply to a change in the constitutional law.

881. Acts performed by the protected state prior to the establishment of the protectorate, which have given rise on the part of

third states to perfect rights legitimately vested, continue to be operative, save when clearly incompatible with the new conditions arising out of the protectorate, and so long as their legal value has not been destroyed in conformity with the rules of "common" law, or they do not become extinguished by the expiration of the term of their duration.

#### EFFECTS OF TREATY ESTABLISHING A PROTECTORATE

**882.** A treaty, properly concluded, establishing a protectorate must be deemed binding between the parties until revoked. Both parties therefore must fully execute the obligations contracted notwithstanding the fact that the execution may be considered onerous or humiliating.

The protected state, however, may bring about the suspension of the treaty by submitting its demand to the decision of a tribunal of arbitration and observing the rules of "common" law relative to the suspension or revocation of treaties.

**883.** Should either party avail itself of the right to suspend the treaty establishing a protectorate, the effects thereof with regard to third powers ought to be determined in accordance with the rules of "common" law relative to the suspension or denunciation of a treaty before its regular expiration.

**884.** The legal import of the international acts accomplished both by the protected and the protecting state must be determined in accordance with the stipulations of the treaty and in conformity with the rules of "common" law.

#### TREATIES CONCERNING SPHERES OF INFLUENCE

**885.** The object of a treaty concerning spheres of influence in uncivilized countries is to determine the portion of territory occupied by the natives with respect to which one of the signatory states may develop its colonizing activity without interference or objection on the part of the other.

In order to set out precisely the substance of this sort of convention, we cannot do better, we believe, than refer to the text of the treaty concluded between Great Britain and Portugal on June 11, 1891, defining their respective spheres of influence in Africa. After having fixed (Arts. 1-7) the boundary of their respective spheres, the two states define their rights as follows:

Art 8. "The two Powers engage respectively not to interfere in matters relating to the sphere of influence reserved to the other by articles 1 to 6. Neither of the two Powers shall acquire territory, conclude treaties, accept sovereign rights or protectorates in the sphere of influence of the other. It is understood that corporations or individuals, citizens of one of the Powers, can enjoy sovereign rights in a sphere of influence reserved to the other only with the consent of the latter Power."

886. Treaties concerning spheres of influence may be considered as designed merely to determine the personal obligations assumed by the contracting parties.

The delimitation of the respective spheres of influence between two contiguous colonizing states may, therefore, be considered as a guide to determine the normal development of their respective activity and to delimit the domain within which they may exercise their initiative with regard to uncivilized tribes in conformity with the principles of "common" law; but it has no value in ascribing territorial rights to either of the contracting parties.

887. Treaties concerning respective spheres of influence must be notified to third powers, so as to give them an opportunity to advance their claims and rights, and may be deemed valid only under the conditions established in the treaty of Berlin of 1885 for the notification of territorial occupations.

Treaties relating to spheres of influence are effective only for the contracting parties. As to third powers, they must be regarded as *res inter alios acta*. Nevertheless, it is incumbent upon third powers, by reason of the *comitas gentium*, to respect these treaties, allowing states that have concluded them time to accomplish their civilizing mission undisturbed. One must admit, on the other hand, that colonizing states cannot, by reason of the treaty establishing a sphere of influence (hinterland), be considered as authorized to act with entire liberty, and, on pretense of colonisation, to prepare for conquest.

See *infra*, rules 1093 *et seq.*

#### TREATIES OF SUZERAINTY AND VASSALAGE

888. A treaty of suzerainty is one concluded between a civilized and an uncivilized state, in which the former imposes on the latter (which accepts it) every obligation of mediate or immediate dependency in the exercise of its rights of sovereignty within the state. When the stipulations imply the submission of the sovereign powers of the uncivilized state to the supreme jurisdiction and authority of the civilized state, the treaty is called a treaty of vassalage.

Under the foregoing names we may rank all the different forms of convention which, at this time, are a result of the so-called colonial policy and which aim in substance to carry out so-called peaceful "conquests," but whose purpose, in reality, is to restore that anomalous form of state without complete autonomy within, denominated semi-sovereign state, destined to temporary existence and unceasing struggle. This has always been the inevitable historical consequence of semi-sovereignty.

These categories of convention are subject to so many gradations that it is difficult to classify them and to apply to them general and uniform principles.

889. Since it implies a kind of alienation of the internal rights of sovereignty and a substitution in the exercise of these rights of the suzerain state, the treaty of suzerainty and vassalage can be valid only when the subject state has freely assented to it and the other state has not unduly resorted to force, contrary to the principles of international "common" law, to compel its consent.

890. The treaty of suzerainty, so long as it subsists and is in force, is of value in determining the respective status of the signatory states as regards the exercise of sovereign powers, and particularly of the legislative, judicial and administrative powers, each of which must be exercised by the suzerain and vassal states in conformity with the stipulations of the treaty.

Compare rules 110 *et seq.*

891. Although the state of affairs resulting from the dismemberment of sovereignty and the dualism of empire and sovereign power should be considered abnormal, yet the treaty which established it must be considered as valid so long as it subsists, and, so far as the exercise of sovereign powers are concerned, must produce the same effects as those which arise from modifications in the constitutional law of the state.

Such effects must be admitted, not only by the contracting parties, but also by third powers, which have *de facto* without protest recognized the state of affairs established by the treaty.

892. The rules relating to collective intervention to safeguard respect for legal principles according to "common" law may be applied to treaties of suzerainty and vassalage imposed by force and in violation of the principles of international law.

Compare rule 559.

893. Collective intervention is especially justifiable when the suzerain state attacks by force the international existence of the vassal state by transforming the relation of suzerainty into actual annexation.

There is no need to lay down more complete rules, which the subject might require, in order to determine the legal value of treaties of suzerainty, because with respect to this exceptional relation, which has initiated a new phase in the relations of civilized states with barbarous and uncivilized tribes, there exists the greatest confusion, caused by the social and international necessity of expansion and by the current of contemporary politics, which, it is said, must aim at the peaceful conquest of less civilized countries, regarding the continual increase of possessions in Asia, Africa and other barbarous regions as contributing to the progress of civilization.

See Fiore, *Diritto internazionale pubblico*, 4th ed., Appendix, v. 2, *Del protettorato coloniale*, p. 628.

#### TREATIES OF CONFEDERATION

894. A treaty of confederation is one by which autonomous and independent sovereign states establish their compact of union, to realize a common purpose of political interest and determine their reciprocal obligations with respect to the object of their political union.

895. The treaty of confederation must determine and establish between the contracting parties the rules of their conduct, and the exercise and limitations of their respective sovereign rights, internal and external, in all matters constituting the object of the political union or confederation.

In its international results, the treaty may be considered effective only as to states which have recognized the confederation established by the treaty.

896. When, by the treaty of confederation, there is constituted a central power, with special functions determined by the purposes of the political union and with powers designed to attain these purposes and to protect the common interests which are the basis of the political union, and when, by consent of the confederated states, there has been assigned to the central power thus created an international legal capacity corresponding with the intended purposes of the union and the development of the common interests, this organization may give rise to a special form of international personality of the Confederation with respect to the states which have recognized it.

Compare Rule 82.

A typical example of this form of political organization was found in the Germanic Confederation, constituted by articles 53, 54 and 55 of the final Act of the Congress of Vienna of June 9, 1815. The Confederation, as a collective entity perfectly distinct, in the internal and external relations of

the confederated states, had its own international personality, until dissolved in 1866, owing to the war between the confederated states and the victories of Prussia, crowned by the celebrated battle of Sadowa. The Confederation had, in effect, the right to conclude treaties, to send and to receive diplomatic agents, to make war, to conclude peace and to exercise other powers, but always in a manner limited by the purpose of the union and without interfering with the international personality of the confederated states, which remained complete and unaffected in all matters not involving the common interests aimed at by the treaty creating the Confederation.

**897.** The treaty of confederation has nothing in common with the federative compact established between several states, united under a political constitution and forming an association called a federal state, federative empire, or compound state.

The federative compact bears the true character of any constitutional law, and in international relations produces the same effects as the political constitution of a state.

Compare rules 104, 105.

#### TREATIES OF POLITICAL ALLIANCE

**898.** A treaty of political alliance is one by which two or more states, in order to realize a certain political object, determine the conditions of their association and of their reciprocal political or military assistance.

**899.** Treaties of alliance may be regarded as useful and not contrary to the principles of justice and of international law; whenever the association of forces is intended for the protection of law and common interests.

**900.** Every treaty of alliance concluded to attain a political object, may be considered just only when the political purpose in view may be considered just and not contrary to the rules of common international law.

The rules that we propose are certainly not in harmony with the conception and purpose of the alliances concluded in our time. In the present state of affairs, since politics predominate over right, and every state ranks greater as its strength inspires fear and respect, the conclusion of alliances with powerful states is an inexorable necessity for governments which, aiming to assure the triumph of their policy in international life, are impelled to take advantage of the association of forces in order to exercise influence. The fear of isolation, which would undoubtedly lead to oppression, sometimes prompts the union of states having very different tendencies and interests. It will suffice to mention the treaty of alliance between France and Russia and the treaty between Italy and Austria. Thus, alliances assume the aspect of veritable leagues of



princes and are more productive of political disturbance and disorder than they are contributors to the protection and development of national interests. There will come a time when states will feel that they are associated with one another, either through the natural force of their common interests or through the noble purpose of protecting "common" law, and then treaties of alliance will attain their true object; but we are still far from that time. It will be necessary for international society, instead of being, as it is to-day, organized to serve political designs, to be transformed into a veritable society of law among the states which enjoy the same degree of civilization. See our article under the word *Alleanza* in *Digesto Italiano*.

**901.** Treaties of alliance must define exactly the object and conditions of the association and the reciprocal and respective obligations of the allied states, and be interpreted and executed by both parties loyally and in good faith.

Since the justice or injustice of an alliance concluded by a treaty and the legal value of the treaty itself depend on the political object and purpose of the alliance, it must be considered essential that its object be well defined and specified without ambiguity. One of the treaties of alliance concluded with no definite object was that of September 14, 1815, between the sovereigns of Austria, Prussia and Russia, which was called the Treaty of the Holy Alliance. By reading the text of that treaty, it will be seen how difficult it is to determine the object of that alliance of sovereigns.

**902.** A treaty of alliance, concluded with the obligation to unite the respective military forces to repulse any armed aggression on the part of one or more specified states, is called a treaty of defensive alliance.

A treaty which, on the contrary, implies an obligation of rendering military assistance in case either one of the allied states wages war upon one or more specified states is known as a treaty of offensive alliance.

The treaty signed at Vienna on October 7, 1879, between Germany and Austria and to which Italy adhered in 1882 has the true character of a treaty of defensive alliance. In 1888, it was publicly proclaimed; but the complete text of the treaty has always been kept a secret.

**903.** A treaty of offensive alliance even when not concluded in view of an impending war, must be executed with absolute sincerity and good faith. However, as no military alliance could be considered binding if it should have an object contrary to international law, a treaty of offensive alliance would be inoperative, should the allied state wish to wage war in evident disregard of the rules of international law.

This rule, which bases the treaty of offensive alliance upon the tacit condition that no unjust war shall be waged, might lead to arbitrariness, should

one admit on the part of the allies a wide latitude of decision as to the *casus fæderis*, and every treaty of alliance would thus be rendered offensive. Good faith compels the admission of a sort of presumption that a war waged by the allies is not unjust, and that, consequently, the state which has assumed the obligation to lend military assistance cannot honestly refuse to fulfill its obligation. The legal presumption of the intrinsic justice of the cause of the allies could not, therefore, be destroyed except by undeniable proof to the contrary.

904. Treaties of military alliance can be deemed binding only when the *casus fæderis* supervenes, and while the allied state may consider and decide, according to circumstances, whether the *casus fæderis* exists or not, we must, nevertheless, consider as culpable and wrongful the conduct of a state which seeks by subterfuge to avoid the fulfillment of obligations assumed towards its allies under the treaty.

See, for the non-observance of the obligations assumed by a treaty of alliance, the controversy between the British Government and the States General of the Netherlands, in reference to the assistance requested by Great Britain on the occasion of the expedition against Minorca, in Dumont, v. 7, part I, p. 398.

It is difficult in this matter to reason rigorously and to lay down rules conformable to the principles of law. Now-a-days political interest creates and maintains political alliances and all that can be said is that the obligations of the allies are as effective as the political interest which gave rise to the alliance itself.

#### TREATIES OF PACIFIC ALLIANCE

905. A treaty of peaceful alliance is one in which two or more states, desiring to attain a peaceful purpose of common interest, lay down the conditions of their friendly and reciprocal co-operation.

906. Any undertaking that may be pursued by a state according to the principles of international law may constitute the object of a treaty of peaceful association:

Examples of such undertakings are the co-operative associations established by treaty for the purpose of promoting civilization in uncivilized countries, for suppressing the slave trade where it is still carried on, for laying down the basis of a customs union, and in general any form of association which aims to unite forces towards better achieving some civilizing mission and co-operating for the progressive and successful development of justice in international life.

Treaties of pacific alliance, as we understand them, ought in a more or less remote future to replace those of political alliance, especially between states on the same continent which have attained the same degree of civilisation. It will be necessary, however, for the system now predominating, where politics prevail over right and justice in international life, to make room for one more rational and useful, subordinating politics to the principles of justice. The conception of the solidarity of interests of civilized peoples, the necessity of the international division of labor and the indissoluble bond between the well-being and prosperity of all peoples, and the rational and progressive development of common interests in international life must be better understood. Then the importance of co-operative association will be realized and it will be admitted as a positive principle that the sound and permanent interests of any people cannot be distinguished from those of others.

An example of peaceful association for the development of the economic, industrial and commercial interests of the associated states is found in the German Customs Union, called *Zollverein*. Compare Calvo, *Droit international*, v. 1, §§ 79, 80. For the other forms of union see Oppenheim, *International law*, v. I, p. 622.

Compare rule 867.

#### TREATIES OF COMMON INTEREST

907. Treaties of common interest include all the special conventions by which a greater or smaller number of states agree to regulate their legal relations in matters of common interest by uniformity of law.

908. Governments must recognize the evident reciprocal utility of regulating by treaty relations of common interest, in order thus to establish a uniform law and to effect the progressive development of the legislative work essential to translate into actual fact the legal community of civilized states.

909. Treaties of common interest should follow the progressive development of the common needs which proceed from the development of industry, commerce, international exchanges, art, and division of labor, and must seek to establish law regulating public and private relations and the protection of the rights of states and of their respective citizens.

910. The subject-matter of treaties of common interest may be:

(a) The establishment of uniform and reciprocally binding rules of private international law, fixing the principles according to which the authority of each law is to control with respect to foreigners, persons, property, the modes of acquiring and transferring property by act *inter viros* or by will, procedure, the jurisdiction of the courts when a foreigner is plaintiff or defendant, the

order of proceedings to which foreigners are parties, and the execution of the judgments rendered by foreign courts;

(b) The regulation of the numerous relations arising out of the international development of industry, commerce, art and division of labor;

(c) The facilitating of international exchanges by organizing in an uniform method postal correspondence, telegraphic service, the legal quotation of money exchange, weights and measures, and international railroad transportation;

(d) The legal protection of foreigners by recognizing the international property in trade-marks and commercial marks, designs and products of intelligence and art;

(e) The simplification of legislation regulating the relations arising out of trade, by establishing a uniform law governing bills of exchange, the recognition of foreign corporations, the regulation of general average, bankruptcy, etc.;

(f) The rendering of mutual assistance, so far as it may contribute to promote the respective material and moral interests.

In this category of treaties of public interest fall conventions concluded for the protection of public health, and to prevent the spread of contagious diseases, etc. One of the conventions, inspired by the eminently lofty purpose of safeguarding public morality is that of May 18, 1904, concluded with a view to prevent the traffic in women and young girls, victims of the fraud of procurers who took them abroad for purposes of prostitution. This convention for the suppression of the white slave traffic was signed by Belgium, Denmark, France, Germany, Holland, Italy, Norway, Portugal, Russia, Spain, Sweden, and Switzerland. Austria and Brazil later adhered to the treaty by protocols of January 18, and May 12, 1905. The signatory states agreed to institute measures of surveillance for the repression of the shameful traffic. See *Collezione dei trattati*, v. XVII, pp. 317, 492 and 511, and Italian decree of April 8, 1905, No. 171.

**911.** Treaties of common interest will increase in usefulness in proportion as the co-operating states grow more numerous.

When such treaties are concluded by states assembled in Congress or Conference, they acquire the true authority of international statutes.

**912.** Treaties of common interest are strictly binding between the states that have signed and ratified them or have adhered thereto.

Those concluded by states assembled in Congress or Conference must also be held binding only on the signatory or adhering states

which have ratified them, and must, as to their observance, be considered under the collective guaranty of all the signatory states. They should, however, be considered as the most exact and correct expression of the rules of law, even with respect to states not concerned therein, and as having the same authority as any rule of justice.

Legislative work in international society cannot be carried out otherwise than through treaties, by which the states that sign them determine the rules of their relations and conduct for the future, formally engaging to consider them as binding and to recognize their imperative authority. It is natural that the legislative work that is carried out through treaties should have an importance all the greater as the subscribing states increase in number. It is, moreover, evident that when the rules which in the future are to serve as the basis of the conduct of states have been laid down in a Congress, they must have more authority and indirectly exercise an influence even on the states that have not taken part in the Congress. For, indeed, those states must not only feel induced to adopt such rules by adhering to the treaty, but must also consider themselves as bound to recognize therein the authority that the principles of justice solemnly acknowledged must always have in international life.

States assembled in Congress which determine the rules of their conduct for the future consequently fulfill a mission analogous to that of the legislature.

The authority of the rules on the rights of belligerents in maritime war, laid down at the Congress of Paris of 1856, those established in the Brussels Anti-Slave Trade Conference of July 2, 1890, and others adopted at The Hague by the states assembled in Congress, have undoubtedly a much greater authority than those relating to copyright or to the unification of the metric system.

#### EXTRADITION TREATIES

913. A treaty of extradition is one by which two states settle upon the rules for the extradition of those who have been accused and convicted of offenses committed in one of the states, and have taken refuge in the other.

914. An extradition treaty, duly concluded, determines the reciprocal legal obligation of the contracting states to deliver up to one another criminals who have taken refuge in their territory and are accused or convicted of one of the crimes and offenses specified in the convention, and subject to the conditions named in its stipulations.

The obligation to deliver up to one another fugitive criminals must in general be considered as based on the duty of all states to co-operate in punishing every grave offense and to facilitate the proper administration of criminal justice. The duty, however, cannot be converted into a true legal obligation except through an extradition treaty.

Compare rules 590 *et seq.*

915. States should conclude extradition conventions in order thus to render effective the duty of co-operating for the repression of offenses, on the basis of a perfect reciprocity. They should adopt provisions best calculated to facilitate the punishment of offenses and the administration of criminal justice, by including in the treaty any offense which by its gravity is punishable by a penalty restricting personal liberty for more than three years, excepting only political offenses and those connected with them.

916. The legal obligation of extradition, so far as it is based on treaty, exists only from the day the convention becomes operative and applies only to offenses specifically stipulated in the treaty and committed after it has come into force.

We stress the legal obligation that has a treaty as its basis. As to the right of the sovereign to deliver up offenders, independently of treaty, see rules 591 *et seq.*

917. The stipulations of an extradition treaty may be restrictively interpreted whenever the sovereignty of the state intends to avail itself of its power not to surrender a criminal who has taken refuge in its territory, unless it is bound to deliver him up in conformity with the provisions of the treaty.

The stipulations may, on the other hand, be interpreted broadly when the state, taking a better view of its duty of assistance for the punishment of serious offenses wherever committed, seeks to co-operate in the administration of criminal justice rather than to favor immunity.

All this depends on the manner in which the duty of international justice and mutual assistance to repair the social damage arising from offenses that have no political character is understood.

If one accepts the more just view, namely, that the fugitive criminal, when escaping from the country where he committed the offense, does not acquire any right to immunity, and that the sovereignty of the state where he took refuge has the power and interest to punish him or deliver him up to his natural judge, so that, by undergoing the punishment he deserves he may expiate the social damage he has caused, it follows that the extradition treaty, in so far as it specifies the cases in which surrender is obligatory, cannot be considered as limiting the power of the territorial state to deliver up the individual accused of a common law offense. It also clearly follows that the state may give an extensive interpretation to the provisions of the treaty.

It is, therefore, unnecessary to observe literally the terms of the extradition treaty. The observance of the principles of justice depends, in international relations, on the manner in which their value is understood.

[In the United States, inasmuch as a treaty is the supreme law of the land, a municipal court acting as a committing magistrate cannot legally order the

surrender of a fugitive to a foreign country on requisition for a crime not mentioned in the treaty, or in any case in the absence of a treaty. The United States does not make demands for the surrender of fugitive criminals in the absence of a treaty or for any other than the enumerated offenses. See Moore on *Extradition*, v. I, § 42—Transl.]

Compare: Fiore, *Effetti internazionali delle sentenze penali dell' estradizione*, Turin, 1877, and *Traité de droit pénal international et de l'extradition*, trans. by Ch. Antoine, Paris, Pedone-Lauriel, 1880.

In the system of Italian legislation, extradition is not considered as based on treaty (see note under rule 591).

We consider the true principles in this matter supported in article 4 of the extradition convention between Italy and Uruguay of April 14, 1879, which reads as follows:

"The high contracting parties consider as enunciative and not limitative (the list of crimes) and therefore recognize the power to request and to grant, by reciprocity, the extradition of individuals accused or convicted of other crimes not enumerated in the present convention, provided they are such upon which the legislation of the two countries visits a corporal or infamous punishment. In that case, the action of the two governments is discretionary and optional."

#### CONVENTIONS OF WAR AND TREATIES OF PEACE

**918.** Conventions of war are those concluded between belligerents to regulate an act or relation existing between them during war.

A treaty of peace is a convention by which the belligerents stipulate the conditions upon which they terminate the war.

The rules governing these conventions and treaties will be developed in Book IV.

#### OBLIGATIONS ARISING IN THE ABSENCE OF CONVENTION

**919.** International obligations may arise between states in the absence of any convention, by reason of acts accomplished by one of them or of relations arising out of a given state of facts for which they are responsible.

**920.** A state which, by unilateral act, has assumed an international obligation is bound to carry out what it has voluntarily undertaken to do or not to do, so long as it does not revoke the act by which it bound itself.

Examples of obligations arising out of a unilateral act are not lacking.

The Italian legislature, by article 211 of the Merchant Marine Code, has assumed the international obligation to abstain from the right of capturing the merchant ships of an enemy, with respect to all states which, when the war

breaks out, declare before the commencement of hostilities that they also renounce that right with respect to Italian merchant ships.

Thus, the conventional obligation to consider the private property of their respective citizens inviolate, contracted between Italy and the United States by the treaty of February, 28, 1871, article 11, is assumed, by unilateral act, with respect to all states which, before commencing hostilities with Italy, shall have declared their intention to consider Italian property on the high seas immune from capture.

It is evident that the unilateral obligation assumed by the Italian government towards all states by reciprocity has as much value as that arising out of the treaty with the United States.

The obligation assumed by Italy, by the law of May 13, 1871, concerning the prerogatives of the Sovereign Pontiff and of the Holy See, with respect to all states that have taken cognizance thereof, has, as regards those states, the same legal value as an international treaty concluded with them and implies the obligation to observe the rules sanctioned by that law, so long as Italy, as is its privilege, does not repeal the statute.

Compare rule 25.

The same might be said of the rules of international law relating to the execution of foreign judgments, embodied in the Italian Code of Civil Procedure, title XII, articles 941, *et seq.* The resulting obligation of the Italian government to assure the execution of the judicial decisions of foreign courts in its territory will last so long as the Italian Code of Civil Procedure is not amended or repealed.

**921.** An international obligation, independently of any convention, may arise from a legal or illegal act of a state, which should be considered as obligated towards private citizens in all matters arising out of such acts as affect property relations, according to international law.

Some authorities admit that obligations between state and state may arise out of quasi-contract. See, among others, Heffter (*Droit internat.*, § 100) citing in support of his opinion Neumann, *Jus princ. priv. de pact. et contract*, §§ 824 *et seq.* He gives as an example the payment of money not due, the administration of the affairs of a state without opposition by others, and the acceptance and administration of the guardianship of a minor sovereign.

It does not really seem to us that the principles applicable to civil obligations derived from quasi-contract find a just application with regard to international obligations between states. It may happen that the representative of a state has made a payment not due and that this gives rise to an obligation of the payee state to make restitution; but that obligation has not the true character of an international obligation. It cannot, indeed, be maintained that any obligation of a state has the character of an international obligation merely because the subject of the obligation is a state. The state, as a matter of fact, has a dual personality, a political and a legal personality, and therefore the capacity to assume an international obligation and an obligation according to civil or private law. The international obligation of the state, properly speaking, is that which affects its international personality, which concerns it as a person of the *Magna civitas* and is based on international law. We do not deny that the state may be bound by quasi-contract as well as by contract; but the



obligation arising out of contract or quasi-contract gives rise to a contractual or quasi-contractual obligation, and not to an international one. That relation affects the legal personality of the state, and not its international personality. The obligation must, consequently, be fixed and governed in accordance with the principles which relate to obligations arising out of contract and not those derived from a treaty or from acts of the state, which may give rise to international obligations independently of express and written conventions.

The international obligation may arise from a lawful act, when the sovereignty, in the lawful exercise of its powers within the state, has injured a foreign state or its citizens. In such case, the international obligation of the state to make amends for the damage arises, and it is founded on its international responsibility, which affects its international personality. This may occur, for example, during a civil war or a revolution within a country, when the sovereign, in the legal exercise of his powers, injures foreign states or individuals.

**922.** Any act committed by a state in violation of the principles of international law should be considered unlawful on the part of the culpable state. In such case an international obligation arises on the part of that state to repair any injury caused by the act.

Compare rules 596 *et seq.* on the international responsibility of the state.

#### CONVENTIONS BETWEEN THE HEAD OF THE CHURCH AND THE STATE.

##### CONCORDATS

**923.** The name "concordat" is given to a convention concluded between the head of the Church and the State to regulate their relations and the exercise of their respective powers in regard to certain matters of common interest.

Although the relations between the State, as a political institution, and the Church, as a religious one, should be regarded as established on a basis of reciprocal independence, yet the supreme ecclesiastic power, in so far as it lays down the rules of discipline and supervises the exercise of worship, necessarily enters into relation with the territorial law; and since the two powers, in the development of their functions and the exercise of their respective rights, come into contact with one another, there is no reason why they should not, in common agreement, determine the rules governing their relations by a convention, which, by reason of its special object, is called a "concordat."

Compare rules 723, 729, *et seq.*

**924.** The concordat has not the character of a treaty, but of an agreement concluded between two independent powers on a matter of public interest. The general rules relating to treaties may, however, by analogy be applied to such an agreement in so far as the substantial requisites for the validity and execution of the assumed obligations are concerned.

Compare rule 731.

It being granted that the term treaty may be ascribed only to the written agreement of a state, which is a political institution and which, by that act, assumes an obligation towards another state, it is evident that it is not possible to denominate as a treaty an agreement concluded between one reigning house and another to regulate their personal interests, or between a government and some association for an object of public interest; nor can the name of treaty be assigned to an agreement between the head of the Church, which is not a political institution, and the head of the State, concerning their functions in their reciprocal relations.

It is equally clear that since every form of obligation must have certain requisites of substance and form, that are indispensable both in an agreement concluded between private persons and between states, such requisites are likewise essential in the conventions drawn up between the head of the Church and the head of the State.

Moreover, since the object of such agreements is always a matter of public interest, it is logical to apply to them by analogy the general principles of law which govern treaties rather than those which apply to contracts between private persons. It should be noted, however, that in applying these principles, it would not be correct to admit an exact comparison between the obligations assumed by virtue of a treaty between states and those derived from a concordat concluded between the Pope and the chief executive of a state.

Compare rule 734 and the note under rule 735.

[The Nicaraguan Mixed Claims Commission in passing upon a claim brought by the Bishop of Nicaragua for violation of the Concordat entered into by the Republic of Nicaragua and the Holy See in 1861, held that the Concordat could not be regarded as an international treaty, but as a contractual arrangement which ceases to bind either party if one of them repudiates the obligation. See 9 *American Journ. of Int. Law* (Oct., 1915), page 869.—*Transl.*]

**925.** A lawful object of a concordat is the regulation of the public functions of the head of the State and the head of the Church, provided this does not involve a violation of the independence of the two powers in the exercise of their respective international rights.

Compare rules 724 *et seq.*

Originally concordats were compromises between the Pope, as spiritual head of the Church, and the sovereign, as head of the State, rather than a regulation of their respective public functions on the basis of their reciprocal independence.

Beginning with the first Concordat concluded at Worms in 1122 between Pope Calixtus II and Henry V, the Emperor of Germany, up to those concluded in our time, it will be seen that they sometimes represent an invasion of the political authority with a sacrifice of the independence of the church, and sometimes reciprocal concessions and compromises. Article 3 of the Concordat of 1801 between the Pope and Napoleon shows most clearly the nature of such agreements.

Compare: Orlando, *Sub Vº Concordato*, in *Digesto italiano*; Calvo, *Droit internat.*, 4th ed., § 1605; Bluntschli, *Droit internat. codifié*, rule 443; Bonfilis, *Manuel de droit international public*, §§ 896 *et seq.*

926. When duly concluded, the concordat must be deemed binding between the parties that have signed it, until revoked.

Nevertheless, in so far as it regulates the relations of Church and State in matters of public interest, it must be subject to the political constitution and to the public law of the state in everything involving its validity, authority and revocability, and it must bear the consequences which arise from changes which may occur in the political constitution with respect to matters of public law.

Taking into account the preceding rule and the true nature of the conventions concluded between the head of the Church and the sovereign of the state, it follows that any difference as to the legal value of the concordat, from the viewpoint of its legal efficacy in regulating the relations between the ecclesiastical and the civil authorities must be decided in conformity with the constitutional law of the state. One should, in fact, determine according to that law the scope of the concordat and the limitations upon the capacity of the state to conclude conventions with the head of the Church and to regulate their mutual relations.

It is also clear that since the changes which have occurred in the political constitution of a state imply necessary changes in all the rights and powers that are inconsistent with the constitutional law (including concordats, in so far as they imply the exercise of public powers and functions), it must be admitted that the promulgation of new constitutional law implies the abrogation *ipso jure ipsoque facto* of incompatible conventions previously concluded.

Moreover, since concordats do not give rise to international obligations properly speaking, such as those that arise from treaties, one cannot admit with respect to concordats, as in the case of treaties, the principle of succession in case of annexation, or of the constitution of a new state by uniting small states (compare rules 157 *et seq.*) In such matters, indeed, it is proper to decide any controversy by applying the constitutional law and seeking what influence that law may have on the relations arising out of conventions concluded prior to its coming into force. In principle, it cannot be maintained that, by a change in the international personality of the contracting state, any convention concluded between the church and a state, to which a new state has succeeded, should be considered extinct. It cannot validly be contended, in fact, that because of the new political constitution of a state, one should not respect perfect and vested rights acquired under prior public conventions, when the respect of those rights is compatible with the new constitution, and when the prior convention or concordat has not been expressly abrogated. Everything, therefore, should depend on the nature and object of the agreement and on its compatibility or incompatibility with the new political constitution of the state.

We cannot here develop our ideas any further, because the question really involves public municipal law.

Compare: Scadutto, *Diritto ecclesiastico vigente in Italia*, 2d ed., v. I, pp. 3-5, 7-82, 110-113, and Orlando, Sub. V<sup>o</sup> *Concordato* in *Digesto italiano* and the authors cited by him in the bibliography; Merlin, *Répertoire*, Sub V<sup>o</sup> *Concordat*.

927. Any matter implying a violation of the international rights of man or of the church cannot be the object of a concordat.

In that respect, the efficacy of the concordat must be determined in conformity with the principles of international law and those which should govern the validity of conventions.

The legal value of a concordat, as regards the international rights of man and of the church, must be determined in conformity with the principles of international law. It cannot be claimed that the sovereignty of the state may not grant privileges to a certain religious faith or certain powers of jurisdiction to ecclesiastical authorities, or, on the other hand, that the head of the church may not agree to the intervention of the political authorities in the exercise of their powers, in so far as he regulates ecclesiastical discipline and worship. But these are matters of public municipal law, and the efficacy of the agreements depend on the political constitution of the state.

If, however, the two powers should wish, through agreements concluded with one another, to interfere with the right of freedom of worship, as an international right of man, and if this should result in a struggle which, by its form and intensity, could be considered as a disturbance of the international society, collective intervention would be justified, in order to protect rights thus infringed and put an end to such a manifest violation of international law.

Such would be the case if, through a concordat, a state sought to legitimate the violations contemplated in rules 652 and 653. The same would be true if the sovereignty of the state in any way whatever imposed on the head of the church the obligation to renounce, by concordat, his international rights (rules 73, 706, 727 *et seq.*). In that case third states would secure the right to intervene and be protected (rules 561 and 732.)

**BOOK THREE**

**PROPERTY IN ITS RELATIONS WITH INTER-  
NATIONAL LAW**

## GENERAL PRINCIPLES

**928.** International law must regulate the acquisition, enjoyment and exercise of rights over corporeal and incorporeal things, whenever the interests of international society are involved.

**929.** No right over property can be considered as absolute and unlimited; but it must, so far as its acquisition, enjoyment and exercise are concerned, be regarded as subordinated to the higher principle that it does not entail any injury to the general interests of international society.

Whatever the nature of the property which may constitute the object of the right, its titular or owner must, for the acquisition, exercise and enjoyment of such right, submit to the limitations which have their origin in the exigencies of life in society and in the superior necessity of not violating the general interests of international society.

International law must regulate every relation which operates in the *Magna civitas*. Therefore, it must be admitted that international law must govern the acquisition, enjoyment and exercise of every right over things, in so far as the act performed by the titular or owner of the right may be related to the general interests of other states or to the collective interests of peoples.

**930.** Property, with respect to its legal condition, may be divided into the following classes:

- (a) Common, according to natural law;
- (b) In the dominion or subject to the supreme power of the state, according to international law;
- (c) Public and corporeal or incorporeal, according to the municipal laws of each country;
- (d) Private and belonging to individuals or to legal persons, who must be deemed owners or possessors according to civil law.

## TITLE I

### OF COMMON PROPERTY

#### THINGS WHICH MUST BE DEEMED COMMON

**931.** Common property is that which everybody may enjoy, and which cannot be the object of an exclusive right on the part of the state or of individuals.

Examples of common property are:

- (a) The high seas;
- (b) Navigable international rivers;
- (c) Straits which unite two connecting seas.

**932.** Any state that should assert an exclusive right over common property or should commit an act of dominion over it, would violate international law, and its arbitrary acts with respect thereto could not be legitimated by immemorial usage, by prescription, or by any other title whatsoever.

#### LIBERTY OF THE HIGH SEAS

**933.** The high seas are constituted by all the waters that lie beyond the jurisdictional limits of any state. No part of the high seas may be dominated by any state; they must be considered as open to the common use of the whole world. Every one, therefore, may freely use them in all their extent, observing, however, the rules of international law that must govern the enjoyment of common property and the exercise of rights over it.

The liberty of the high seas implies the liberty of navigation and of freely taking submarine products by fishing.

It is the duty, however, of those who navigate the sea to comply with the international rules relating to navigation.

The rules relating to navigation, either on the high seas or in territorial waters, will be discussed hereafter.

**934.** Any claim of dominion over any portion whatever of the

high seas, and likewise any exercise of jurisdiction of vessels of war over ships that do not belong to the navy or to the merchant marine of the state, subject to the special stipulations of treaties, must be considered contrary to the absolute liberty of the high seas.

Some publicists have maintained that as any vessel of war dominates the waters that surround her within gun shot, we might hold that within this perimeter, waters should be deemed in the legal possession of the vessel. But this opinion is not admissible, according to true principles, since common property absolutely lacks the possibility of being either as a whole or in part the object of a right. Hence no right over the whole or over a part of such common property may be acquired or retained by force.

**935.** No war vessel on the high seas can, except on serious and well-founded grounds, compel a ship sailing under the flag of the state to which she belongs to stop in order to verify her nationality or to subject her to an examination by megaphone. Any act of sovereignty and jurisdiction unduly exercised must, in general, be considered as a violation of the absolute principle of the liberty of the seas and involve the responsibility of the commander of the war vessel.

#### INQUIRY INTO THE NATIONALITY OF A VESSEL

**936.** The flag carried by a merchant ship must be considered *prima facie* as the distinctive token of its nationality and, consequently, of the jurisdiction to which she must be deemed subject. A war vessel may, by hoisting her flag to indicate her nationality, request the merchant ship she meets to hoist her own flag, and compel her to do so in case of non-compliance by firing a blank shot, and this failing, a cannon shot, but without seeking to hit her.

**937.** When the war vessel is in serious doubt as to the nationality indicated by the flag, she may, in order to verify the point, call the ship to parley, requesting her to answer the questions put to her by megaphone or otherwise, but without compelling her to deviate from her course.

If, following this interpellation, the commander of the war vessel is still in serious doubt as to the nationality indicated by the flag, he may compel the vessel to stop in order to verify her papers; but he is bound, both in compelling her to stop and



verifying her papers, to proceed with moderation and tact as indicated hereafter (rule 947).

The nationality of a ship always determines the jurisdiction to which she is subject and the privileges she must enjoy by reason of the fact that she belongs to this or that state. It must, therefore, be conceded as a rule of "common" law that every ship must have a nationality which she is bound to establish. Consequently, when, owing to exceptional circumstances, there is ground to doubt the nationality asserted by the flag, it ought to be permissible to proceed to the verification of her nationality, but with moderation and without abuse of the power.

Thus, for instance, within the zone fixed by the General Act of Brussels of July 12, 1890, the right of search is reciprocally admitted over all vessels belonging to the nationality of the signatory or adhering states, in order to ascertain whether such vessels are engaged in the slave trade. Nevertheless, this right cannot be exercised with respect to French ships, as France, in ratifying the Act of Brussels, made reservation as to articles XXI, XXII, XXIII, XLII and LXI. Now it is evident that in order to decide whether or not a ship may enjoy the privilege of French ships, it is necessary to ascertain whether or not the ship met within the zone where search is allowed, has French nationality, and in that regard the mere fact of flying the French flag cannot be considered decisive. It is necessary that she present her sea-letter or passport (*Acte de francisation*) which determines her nationality, and therefore the right of verifying that document should be conceded when the nationality displayed by the French colors may be considered doubtful.

Compare the instructions of 1867 to French cruisers for the verification of nationality and the similar instructions to British cruisers in 1891, with respect to their attitude towards ships flying the French flag. The latter instructions were communicated December 31, 1891, to the Prince de Chimay, Belgian Minister for Foreign Affairs.

#### VISIT AND SEARCH ON THE HIGH SEAS

**938.** Examination as to the nature of the cargo and search may be admitted only in time of war and outside the territorial waters of neutral powers, while observing the rules relating to the exercise of this belligerent right.

In time of peace, the inspection of the ship's papers and search on the high seas may be justified by way of exception:

(a) With respect to vessels committing piracy or open to serious suspicion thereof;

(b) With regard to ships engaged in the slave trade or in the importation of arms, ammunition or spirituous liquors into Africa, complying, however, with the rules laid down in the Act concluded at Brussels on July 2, 1890, even in so far as it determines the zone within which such exceptional powers may be exercised:

(c) With regard to ships caught in the act of cutting or damaging a submarine cable, or giving rise to serious suspicions of an attempt on their part wholly or partially to interrupt interoceanic communications.

In such case, the commander of the war vessel may undertake the necessary examination to establish the offense or attempted offense and to seize the ship, mentioning in his log book all the circumstances justifying his intervention.

#### POWERS WITH RESPECT TO A VESSEL ENGAGED IN PIRACY

**939.** The commander of a war vessel which, on the high seas, meets a ship engaged in piracy or open to suspicion thereof, and compels her to stop, may proceed to the examination necessary to establish the true character of the ship.

**940.** The right of jurisdiction granted to the commander of a war vessel with respect to a ship suspected of piracy which he meets on the high seas must, on principle, be considered as limited in proportion to the degree of basis for suspicion, and it should in no way be abused.

He is, therefore, bound to proceed with caution with the examination necessary to ascertain the true character of the vessel and to refrain from any act not warranted by the circumstances and which might cause him to be suspected of having sought to interfere with the liberty of navigation.

**941.** When, as a result of his examination, the commander ascertains that the vessel is engaged in piracy, or that she is open to suspicion thereof, he may seize her and compel her to follow the war vessel to be delivered up to the competent authorities for trial on the charge of piracy.

Compare rules 301 *et seq.*, relating to criminal jurisdiction with regard to pirate ships.

**942.** The commander who has seized a ship engaged in piracy or suspected thereof must mention in his log book the circumstances on which his action was based.

Should it afterwards appear in the trial that he had abused the power vested in him, he is to be held responsible for his acts and may be compelled to pay damages, taking account of the circumstances and of the degree of fault of the ship in giving rise to a

justifiable suspicion and to the action of the commander in ascertaining the character of the ship.

**943.** A merchant vessel attacked by a pirate ship always has the right to defend herself by force, and if she succeeds in capturing her, she may take her to the first accessible port and deliver her over to the maritime authorities in order that justice may take its course.

#### EXCEPTIONAL PRINCIPLES FOR THE SUPPRESSION OF THE SLAVE TRADE

**944.** The principle of the liberty of the high seas cannot be regarded as violated because, in order to suppress the slave trade, the signatory states of the General Anti-slave Act of July 2, 1890, have given to their respective war vessels the power of jurisdiction over the non-territorial waters of Africa and the regions where slavery is tolerated, so as to suppress the unlawful traffic in negroes.

**945.** The exceptional powers attributed under that Act to ships of war with regard to their respective merchant ships on the basis of a strict reciprocity are founded upon the Brussels Act of July 2, 1890. This convention is binding only upon the states which, after signing it, ratified it or subsequently adhered to it.

These powers, which constitute a derogation from the "common" law, must be considered as specifically set forth in the clauses of that convention and must be exercised in conformity therewith.

The Anti-slave Act of July 2, 1890, was signed by the following states: Austria-Hungary, Belgium, Congo, Denmark, France, Germany, Great Britain, Italy, Netherlands, Norway, Persia, Portugal, Russia, Sweden, Turkey, United States and Zanzibar.

The exchange of ratifications took place at Brussels, by the protocol of January 2, 1892 (*Trattati relativi all' Africa*, v. I, p. 363). France, however, made reservation with regard to articles XXI, XXII, XXIII, XLII and LXI, and consequently, with respect to ships of French nationality, the exercise of exceptional powers, such as the examination of the manifest and visit, is excluded and the special treaties concluded by France with each of the signatory powers must be considered as applicable. The General Act was subsequently completed by the conventions of June 8, 1899, and of November 3, 1906, also signed at Brussels, regarding the traffic in spirituous liquors in Africa.

See concerning all these acts the volumes published by the General Office of Colonial Affairs of the Kingdom of Italy (*Documenti relativi all' Africa*), 1906.

**946.** The principle of the liberty of the seas must be regarded as violated, if the states signatory to the Anti-slave Act of 1890,

in order better to attain their noble purpose, should assimilate the slave trade to piracy or assume any right of jurisdiction whatever over the merchant vessels of other states that have not signed the treaty or subsequently adhered thereto.

Everybody must recognize that the negro trade constitutes the gravest assault upon the rights of human beings and that the suppression of such a trade must be regarded as an act of international justice. It must be admitted, nevertheless, that the repressive measures ought in principle to be within the exclusive competence of each state, which possesses the right to subject its merchant vessels to the jurisdiction of its war vessels, prescribing penal sanctions for the suppression of this unlawful traffic. Acts of jurisdiction of the war vessels of a state over foreign merchant vessels can be justified only by virtue of a treaty conferring such right subject to reciprocity to the respective war vessels of the signatory powers. Any act of jurisdiction not based on a treaty, notwithstanding its praiseworthy purpose, must accordingly be regarded as opposed to the principle of the liberty of the sea and hence to the independence of states.

This idea is formulated in article XLV of the Act of Brussels, which reads, in translation: "The examination of the cargo or search can only take place in the case of vessels sailing under the flag of one of the powers which have concluded or may subsequently conclude the special conventions provided for in article XXII and in accordance with the provisions of such conventions."

#### METHOD OF PROCEDURE FOR INSPECTION AND SEARCH

**947.** The commander of the war vessel may resort to coercive measures in order to proceed to the inspection of the ship's papers and to visit in the cases provided for in the foregoing rules, only when the merchant vessel does not promptly respond to the request to stop. In that case, he may support his demand by firing a gun with successive blank shots and if the vessel does not stop, he may direct the shots first at the sails, then at the masts, and finally, if the vessel should persistently refuse to obey, at the hull, until the vessel heeds the warning and heaves to.

**948.** As soon as the vessel has stopped, as a result of the warning or the coercive measures, the commander may personally undertake the inspection of the ship's papers and, if necessary, search her, or charge with that duty an officer delegated by him, who must be accompanied by another officer who, in case of need, may bear witness to what has taken place during the visit.

**949.** The boarding officer will undertake the inspection of the papers and if necessary, the search of the vessel in the manner least vexatious, bearing in mind the instructions of the commander.

Any unjustified delay must always be avoided and the vessel be allowed to proceed freely on her way when *prima facie* all reason for suspicion against her appears unwarranted.

**950.** The boarding officer must first examine the ship's papers and can proceed to the examination of the cargo only when, from the papers, there exists a serious suspicion that the vessel is engaged in a trade declared unlawful under the above-mentioned Act of Brussels or other acts which prohibit traffic in certain things (spirituous liquors, firearms, or ammunition) and which admit the right of visit and search as a measure of repression.

**951.** When it is necessary to proceed to the examination of the cargo, it can take place only on formal authorization of the commander of the war vessel on whom rests the responsibility therefor. The examination must always be made with circumspection and moderation, avoiding damage to the cargo so as to prevent just claims.

**952.** The inquiry on the part of the war vessel to ascertain whether the vessel under examination is lawfully authorized to carry the flag she is flying, must take place in an appropriate case under due observation of the rules set forth above as regards visit and search.

#### SEIZURE OF THE SHIP ON THE HIGH SEAS

**953.** Besides the ships included within the categories mentioned in paragraphs *a* and *c* of rule 938, any merchant ship, under the general Act of Brussels of July 2, 1890, may be seized:

- a.* Which, being liable to search, shall attempt to avoid it by flight or force;
- b.* Which declines to produce the ship's papers in a case where she must be considered bound to do so, or which, in any manner whatever, has hindered the work of the officials who, under the terms of the Brussels Act, are charged with the duty of examining these papers;
- c.* Which has no ship's papers or whose papers present grave irregularities;
- d.* Which are unlawfully engaged in transporting firearms, ammunition, or spirituous liquors intended for countries or coasts where such traffic is prohibited by treaty, either

when the prohibited goods are on board or when it is proved that the ship has jettisoned such goods before submitting to the search;

- e. Which is not duly authorized to sail under the flag she flies and is therefore guilty of a fraudulent use of the flag.

#### OFFICIAL MINUTES AND RESPONSIBILITY

954. In whatever case commanders of war vessels exercise on the high seas the exceptional powers prescribed in the foregoing rules, they are bound to draw up an official statement of the acts performed and of all the circumstances on which they were based and to mention the declarations and protests of the captain or commander of the ship subjected to inquiry, inspection, search or seizure, and to transmit to the Minister of Foreign Affairs of their country a detailed report which must serve to determine the responsibility for the commander's acts in the proceeding which must be instituted before the competent authorities to determine their legality.

#### VISIT AND SEIZURE WITHIN TERRITORIAL WATERS

955. As the sovereign of a state enjoys the unquestionable right of exercising jurisdiction and police powers within the limits of its territorial waters, it follows that he may regulate commerce and navigation over these waters; prohibit therein traffic in certain goods (provisions, ammunition, spirituous liquors, etc.); provide for the punishment of those who violate such prohibitions; exercise police powers with respect to all foreign ships without distinction in territorial waters; and subject to search those suspected of violating the prescribed laws and regulations.

956. The surveillance, control, inspection of cargo and search within the limits of territorial waters, or to the limit of the maritime frontier of every state, must be deemed justified as measures of security and public order required for the protection of the continental territory and by the necessity of preventing contraband trading or smuggling.

The word *contraband* must be understood in its general acceptance, that is, of a thing done "*contra il bando*," in other words, contrary to law and duly

published preventive regulations. It is, therefore, fiscal contraband to import goods in violation of fiscal laws and customs regulations. It is contraband of war unlawfully to transport arms and articles intended for the enemy in violation of the laws of war. In like manner, if a state should prohibit by law the importation of arms and ammunition in the countries subject to its sovereignty or protectorate, traffic within the territorial waters of that state in such prohibited goods must be designated as contraband.

Compare, for the basis of the proposed rules: Calvo, *Droit international*, 4th ed., v. I, § 383, p. 517; Pradier-Fodéré, *Droit international*, v. II, § 630; Perels, *Droit maritime*, French translation, p. 50; Ortolan, *Droit pénal*, 3d ed, v. I, p. 390; Faustin Hélie, *Traité d'instruction criminelle*, v. XI, p. 508; British law of August 16, 1868.

Search within French territorial waters to prevent smuggling is admitted under the law of 4 Germinal, year II, art. 7, title II and under that of March 27, 1817, art. 13.

957. Any war vessel intending to subject to inquiry and search a foreign merchant ship within territorial waters, must undertake the search in conformity with the provisions of the treaties concluded by its government with the state to which the merchant ship belongs. According to these treaties, the assistance of the consul may or may not be required. The war vessel, furthermore, may compel the merchant ship to heave to and may keep her in custody in order to search her in accordance with the rules of existing treaties.

See the treaty concluded at London, December 13, 1906, between France, Great Britain and Italy, to regulate visit in territorial waters with a view to suppress the traffic in arms in Africa.

958. When a war vessel which intends to subject to search a merchant ship in territorial waters suspected of contraband trading, has without avail requested the ship to stop and has commenced pursuit to compel her to heed the request, she may continue the pursuit beyond the maritime belt, provided the pursuit is continuous, and use the coercive measures indicated in rule 947.

#### PROCEEDINGS UPON SEIZED SHIPS

959. Proceeding against ships seized in time of peace in the cases set forth in the foregoing articles must be instituted before the competent court, which must pass upon the grounds on which the seizure was based, and determine the penalties incurred.

960. When a foreign merchant ship has been arrested in territorial waters, the case must be referred to an authority com-

petent under the law of the arresting state. If the seizure was made on the high seas, the proceedings must be instituted before an authority competent under the law of the flag of the merchant ship.

Compare the general Act of Brussels of July 2, 1890, arts. XLIX *et seq.* and that of Algeiras of April 7, 1906, for the suppression of the traffic in arms in Morocco.

#### NAVIGABLE RIVERS

961. Navigable rivers passing through or separating the territory of different states are deemed international rivers and are subject to the rules that must govern the high seas, as regards the liberty of navigation and their peaceful use for the needs of commerce. These rules are applicable to them from their mouth as far down as they are navigable.

962. Riparian states must consider themselves in *de facto* community and none of them may to the prejudice of others limit the liberty of navigation over the section of the river passing through its territory, nor interfere with the freedom of international commerce.

963. It is the duty of states through which a navigable river passes to determine by common agreement the rules of navigation, in order to assure to navigators the free use of the river for the needs of commerce without undue restrictions.

This rule is based on that laid down in articles 108 and 109 of the treaty of Vienna of 1815, which read as follows:

Art. 108. "The powers whose states are crossed or separated by the same river undertake to regulate by mutual agreement all matters related to the navigation of that river."

Art. 109. "Navigation over the entire course of rivers indicated in the preceding article from the point where they become navigable up to their mouths is to be entirely free and cannot, with respect to commerce, be forbidden to any one."

The community of fact which, by the nature of things, exists between riparian states, prevents one of them from doing anything contrary to the purposes of the common thing. It thus follows that, as the river is an indivisible whole and must be deemed as intended to serve the needs of international commerce, the liberty of navigation possessed by all cannot be limited or restricted at the pleasure of the state which possesses the banks of one of the sections of the river, without changing the nature of the common thing.

Compare: Fiore, *Diritto internazionale pubblico*, 4th ed., v. II, §§ 794 *et seq.*



## RULES FOR THE NAVIGATION OF INTERNATIONAL RIVERS

**964.** The rules of river navigation must on principle be laid down in harmony with the general interests and not in favor exclusively of the private interests of one or other of the riparian states.

When the latter do not agree upon the regulations to be observed in navigating the whole course of the river, any of the riparian states may require that regulations be prepared by an international commission in conformity with the principles of law relating to the freedom of international commerce.

The regulations for the liberty of the navigation of rivers, drawn up in conformity with the treaty of Vienna, provide: "Article 2. Navigation over the entire course of the rivers indicated from the point where they become navigable to their mouths is to be absolutely free and cannot, with respect to commerce, be forbidden to any one, provided he conforms to the uniform regulations established for the policing of navigation, and so far as possible, favorable to the commerce of all states.

Art. 3. The system which is to be established for the collection of tolls and for the maintenance of navigation is to be as far as possible the same throughout the entire course of the river and is to extend, unless special circumstances interfere, to the arms and affluents thereof which, throughout the length of the navigable portions, separate or cross different states.

**965.** No riparian state can subject the section of an international river that passes through its territory to special regulations favorable to its own interests. It must be deemed a violation of international law for riparian states to agree to enact regulations applicable to the whole river, an act opposed to the principle of the free navigation of the river.

**966.** The right of riparian states to regulate in common accord the navigation of an international river passing through or separating their territory must always be subordinated to the "common" law which protects the freedom of navigation.

**967.** Riparian states must not make any change nor undertake any public work susceptible of making the river unfit for its purpose. If it should do so, any riparian state may require that the river be maintained throughout its course in a condition fit for the needs of international commerce and that every obstacle to the freedom of navigation be removed.

**968.** It is the duty of every riparian state to undertake the works necessary to maintain the river in a good condition of navigability. When unable to construct them, it cannot oppose their

construction by all the riparian states or by one of them, all agreeing to a pro rate contribution to the expenses incurred.

#### PRINCIPLES CONCERNING THE REGULATION OF RIVER NAVIGATION

**969.** The regulation of river navigation must provide for:

(a) Effecting whatever may be necessary to secure the easy and safe navigation of the navigable course of the river;

(b) Determining the technical works to be constructed at joint expense or at the expense of one or other of the riparian states and supervising their construction;

(c) Preventing such works as may alter the course or distribution of the waters or create some obstacle to the freedom or safety of navigation;

(d) Reconciling the private interests of every riparian state and of its citizens with general interests;

(e) Establishing an authority to enforce the regulations.

**970.** It is the duty of each riparian state to provide, by special regulation, for the police of navigation over the section of the river flowing through its territory; to prevent smuggling therein; and to regulate health inspection, quarantine, and the payment of navigation dues by the ships entering its ports, all without prejudice to general interests.

**971.** The arms of an international river, communicating with the sea and meeting the proper conditions of navigability must, throughout their navigable course, be considered as constituting part of the river and subject with respect to navigation to the regulations governing the river.

#### NAVIGATION TAXES AND DUES

**972.** The right of each state crossed or bounded by an international river to collect any kind of contribution under the name of navigation tax must be determined and limited in proportion to its share of expense in maintaining the river in a condition of navigability. Such tax is to be considered as compensation for the expenses incurred to that end.

**973.** Every regulation of a riparian state which subjects navigation over a river to the payment of transit dues must be considered as a violation of international law. Such taxes would

imply the assertion of a right of sovereignty over waters which, according to "common" law, every one has the right freely to enjoy for the requirements of navigation.

**974.** The general taxes of entry and transit which each of the riparian states may collect upon vessels navigating the section of the river within its jurisdiction must be determined by means of tariffs officially published and proportionate to those established for the seaports open to commerce, increased only in consideration of the expenses necessary to maintain the river in its own section in a state of navigability.

**975.** Any form of contribution, imposed for any reason whatever by one of the riparian states on ships transporting goods in transit, which is not conformable to the general tariff and in proportion to the technical and administrative expenses incurred in the interests of navigation, is to be considered as an arbitrary charge and as contrary to the principle of the international freedom of navigation and commerce.

**976.** The collection of navigation dues, when justified, must always be simplified so as not to interfere with the freedom of commerce.

It must be deemed essential, therefore, that the amount of such duties be independent of the nature of the cargo, and proportionate to the capacity of the ship, and that all forms of differential treatment be eliminated.

The capacity of a ship must be considered as established by its tonnage as indicated in the ship's papers.

The only vessels which may be subjected to the payment of customs duties are those entering ports for commercial purposes, exempting those which, through the necessities of navigation, are forced to discharge or deposit their cargo, which must be subjected only to the expenses of discharge and deposit in accordance with local regulations.

#### COMPULSORY PILOTAGE

**977.** No riparian state can compel the ships that pass through the section of the river under its jurisdiction to employ an experienced local pilot, except under circumstances and in localities in which it might be dangerous to trust the management of a ship to a foreign pilot.

## COASTING TRADE

978. Every riparian state may reserve the coasting trade in the section of the river under its jurisdiction to its own citizens. The transportation of passengers along the banks of the different sections of the river must be subject to the rules governing the maritime coasts of civilized states.

## LEGAL ENFORCEMENT OF THE REGULATIONS

979. Regulations concerning the navigation of international rivers are considered to be under the collective guaranty of all the states constituting the international society, and may be declared binding by them upon any riparian state which may have refused to subscribe or adhere to them.

980. A regulation of river navigation, drawn up by common agreement among the riparian states and accepted by other states without opposition, cannot be modified independently by any of the states parties to it.

Each state has the right to provide for the enforcement of regulations established by common accord to protect the freedom of navigation and commerce and to control any modifications which might be made to the detriment of the general interests.

## JURISDICTION OVER CONTROVERSIES REGARDING RIVER NAVIGATION

981. The decision of any controversy of international import relating to the navigation of international rivers, or which may proceed from a violation of or non-compliance with, the rules of international law which concern the control and administration of these rivers, must be referred to a permanent international commission, or to a special tribunal constituted both by the representatives of the riparian states and by those of other states.

982. Controversies which may arise from acts of private persons occasioned by some event or by an accident of navigation in one section or other of the river, or from non-compliance with the special regulations established by each riparian state are to be referred to the courts of the state having jurisdiction of the section of the river in which such acts or violation of regulations occurred.

This rule aims to fix the competence of the international commission and that of the territorial authorities. An international jurisdiction could not be justified with respect to acts of all kinds occurring on an international river. Whenever such acts, by their nature, cannot be deemed of international import, it is reasonable that they should be submitted to the territorial administrative or judicial authorities. So far as they are concerned, indeed, the competence of a special international jurisdiction substituted for the ordinary territorial jurisdiction cannot be justified.

NAVIGABLE RIVERS FLOWING THROUGH THE TERRITORY OF A SINGLE  
STATE

**963.** Navigable rivers which from their source to their mouth flow through the territory of only one state must be assimilated to the open sea from the point where they become navigable.

The right to navigate them freely and to fish in them must, therefore, be recognized as open to the vessels of all nations, but it must be conceded also, that the sovereign, having dominion over the banks of the river, may fix the conditions upon which foreign ships may utilize the banks and ports for commercial purposes.

This rule is based on the idea that all waters which cannot be considered within the dominion of any particular sovereignty ought to be in the class of common things which, according to the law of nations, may be used and enjoyed freely by every one.

The state to which the banks of a navigable river belong cannot have legal possession of the waters beyond the maritime frontier, that is, beyond three miles from the shore. Therefore, the state cannot prevent ships wishing to enter the river from the sea from navigating freely over the portion beyond the maritime frontier, either to carry on fishing, or to occupy an island formed in the bed of the river, or for any other purpose. The navigable river even when it flows through a single state must be assimilated to the open sea. Yet such river cannot be used for international commerce, and therefore, could not be subject to the same regulations as international rivers in the matter of the freedom of international commerce. The interference with commerce on an international river may undoubtedly be considered as opposed to the principles of an enlightened policy and to the economic interests of the state itself; but we cannot maintain that the territorial sovereign has not the right to apply to the commerce carried on within his territorial river waters the principles which he considers best, without being subject to the restrictions which, in the common interest in the freedom of international commerce, ought to be considered imposed on all the riparian states with regard to international rivers.

**964.** The state to which both banks of a navigable river belong may prohibit navigation within its territorial waters to foreign

ships and the carrying on of trade in the open ports throughout the course of the river or may regulate navigation and trading without equality of treatment.

Every right of the sovereignty of the state over a river within its territorial limits must be subject to the same rules which govern the rights of sovereignty over territorial waters.

#### POSITIVE LAW RELATING TO RIVER NAVIGATION

985. Save for the application of the principles of "common" law in the absence of treaty regulating the navigation of an international river, everything concerning the liberty of navigation of a river and the exercise of the respective rights of the states separated or traversed by such river must be considered as governed by treaties or special regulations.

986. Whenever the treaty or the regulations are silent, or it becomes necessary to construe the stipulations of the convention or regulations, every question or dispute must be decided in the sense most favorable to the principle of the freedom of navigation and of international commerce.

987. It is the duty of international commissions created to provide for the execution of the provisions of treaties, to draw up without delay the regulations of navigation and river police with a view to assure the navigability of the river; to fix the general tariffs for navigation dues; and to regulate the police, administration and supervision and do everything required in the common interest to facilitate navigation and to promote the freedom of international commerce.

The treaties concluded to regulate the navigation of the different international rivers are rather numerous and to set out the rules of positive law according to such treaties would be a long and involved task. Certain data on the most important rivers will be found in v. II of our work: *Trattato di diritto internazionale pubblico*, §§ 805 *et seq.* One of the most important acts, in which are embodied the most liberal principles relating to river navigation, is the general and final act of the Conference of Berlin of February 2, 1885, in Chapters IV and V of which are contained the rules adopted for the navigation of the Congo and Niger rivers. See, Catellani, *Le colonie e la Conferenza di Berlino*; Calvo, *Droit international*, §§ 308 *et seq.*; Engelhardt, *Du régime conventionnel des fleuves internationaux*; Bonfils, *Manuel de droit international public*, §§ 520 *et seq.* and the authors there cited; Pradier-Fodéré, *Droit international*, v. II, §§ 682, 757; Rivier, *Principes de droit des gens*, v. I, pp. 220 *et seq.*; Oppenheim, *International law*, vol. I, 2d ed., pp. 240-244. *The Institut de*

*droit international* adopted at Madrid certain international rules regarding rivers. See *Annuaire*, v. XXIV, 1911.

#### ARTIFICIAL NAVIGABLE CANALS

988. Navigable canals artificially constructed to be used for international navigation, even when, throughout their whole length, they cross the territory of a single state, must be considered as governed by the rules of international law which guarantee the freedom of navigation.

The most important interoceanic maritime canal opened to international commerce is the Suez Canal, which represents one of the most stupendous works performed during the XIXth century. It is situated entirely in Egypt. Another is the Corinth Canal, built on Greek territory and opened on August 24, 1893, but it has not the same international importance. The Panama Canal unites the Atlantic with the Pacific Ocean. Finally, there is the Kiel Canal, uniting the bay of the same name with the mouth of the Elbe river.

989. The rights of the territorial sovereign of the territory traversed by the canal and those of the contractors who built it must be subordinated to the general interest, which consists in using such means of communication for international transportation and commerce. Therefore, aside from the rights of jurisdiction of the territorial sovereign according to "common" law, and those which must be recognized on the part of the concessionaires under the contract providing for the undertaking, everything concerning the free use of the canal on the basis of perfect equality must be determined by common accord and remain under the protection and control of the states whose duty it is to safeguard the use of the canal for the needs of navigation.

990. The establishment of rules guaranteeing the free use of a navigable canal and reconciling general interests which arise from its use by all states for the needs of international commerce, with the rights of the territorial sovereignty, ought to be reserved for an international conference or commission.

The regulations for the navigation of the Suez Canal were drawn up in common accord at the suggestion of Great Britain, which proposed the meeting of a conference of the interested powers in order to establish conventional regulations to guarantee the freedom of navigation in time of peace and in time of war. This invitation was notified through diplomatic channels by the circular note of Lord Granville, of January 3, 1883. On March 17, 1885, there was signed at London the following declaration, by which there was instituted

a commission to prepare a draft of the regulations: "Whereas the powers are agreed in recognising the pressing need of a negotiation with a view to sanctioning through a convention the establishment of a definite régime with the object of guaranteeing at all times and to all the powers the free use of the Suez Canal, it is agreed between the seven aforesaid governments that a commission composed of delegates appointed by the said governments shall meet at Paris on March 30 to prepare and draw up such convention, taking as a basis the circular of His Britannic Majesty's government of January 3, 1883."

Compare: Fiore, *Diritto internazionale pubblico*, 4th ed., v. II, Appendix, pp. 616 *et seq.*

**991.** States must see to it that artificial maritime canals are always free and open to commerce in times of peace and of war, maintaining the principle of perfect equality with respect to the ships of all nations and avoiding any privilege and advantage that might be established by private agreement. They must, moreover, arrange to eliminate any obstacle by the territorial sovereign to the entire freedom of navigation, while reserving the rights of such sovereign, subordinating them, however, to the safeguard of the general interests.

The conventional régime of the Suez maritime canal, established by the Conference of Paris of 1885, and confirmed in the treaty signed at Constantinople, October 29, 1888, complies fully with the principles of science and the exigencies of the freedom of international commerce. Under that treaty, not only was the free use of the Suez Canal guaranteed in times of peace and of war, but there was secured as well the principle of equality as regards the free use of the canal. In effect, the signatory powers formally engaged not to attempt to obtain any territorial or commercial advantage or privileges through international agreements which might subsequently be concluded with respect to the canal (art. 12): "The high contracting parties agree, by application of the principle of equality as regards the free use of the Suez Canal (a principle which is one of the bases of the present treaty) that none of them shall seek territorial or commercial advantages, or any privileges in the international arrangements which may take place with respect to the Canal. The rights of Turkey, furthermore, as a territorial power are reserved."

**992.** Dues and tolls of transit, pilotage, towing, etc., paid by the ships that use an artificial canal, must be established with moderation and be regarded as intended to make good the money expended in building the canal and to cover the expenses necessary to maintain the canal in a condition of navigability.

#### LIBERTY OF STRAITS

**993.** Straits that unite open seas, or a sea open or closed, with an international river, must, so far as concerns their use, be deemed



common property, everybody having the right to use them freely for the needs of navigation and of commerce.

**994.** No territorial sovereign may, without violating international law, refuse to recognize the freedom of transit through straits or consider straits as within his exclusive domain even when both shores belong to him and he can in fact prohibit their use by force.

**995.** It must be regarded as contrary to international law to compel ships which cross a strait to pay to the sovereign to whom the shores belong any tax or toll which might have the character of a tax for passage, save when such tax may be considered as representing the services rendered and expenses incurred in rendering the strait fit for navigation.

**996.** Any toll which might be justified ought to be confined within the strict limits of reimbursement for actual services and actual expenditures incurred in rendering the strait navigable, so as to remove from the toll any character of a tax for passage.

**997.** A state which would collect a duty disproportionate to the services rendered by it could be compelled to put an end to such an abuse and to limit its claims according to equity or as might be determined by arbitration.

**998.** The state to which the shores belong always has the right to regulate the navigation of the strait, so as to assure its own safety and defense in time of war. Such right must be recognized particularly with respect to straits which connect an open sea with a closed sea.

**999.** The right of passage of war vessels through the straits of the Bosphorus and the Dardanelles must remain subject to the conventions concluded between the Ottoman Empire and the other powers relating to navigation in these straits.

The navigation of the Bosphorus and of the Dardanelles was regulated by the convention of July 13, 1841, which was revived by article 10 of the treaty of Paris of March 30, 1856, and was regulated by the convention of the same day annexed to that treaty. This latter convention was maintained by the treaty of London of March 13, 1871, which provides in article 2: "The principle of the closing of the Straits of the Dardanelles and the Bosphorus, as laid down by the separate convention of March 30, 1856, is maintained, with the faculty on the part of His Imperial Majesty the Sultan to open the said Straits in time of peace to the ships of war of friendly and allied powers in case the Sublime Porte should deem it necessary in order to safeguard the execution of the stipulations of the treaty of Paris of March 30, 1856."

## LIBERTY OF FISHING ON THE HIGH SEAS AND IN NON-TERRITORIAL WATERS

1000. Liberty of fishing on the high seas and in non-territorial waters must be deemed the natural right of man.

It is the duty of the sovereign of every state to regulate this branch of industry with respect to his citizens who wish to carry it on and to protect their right in competition with foreign fishermen, assuring the respect of and compliance with the rules founded on "common" law and those which, according to usage and custom, must govern fishing in open waters.

1001. No state may claim the exclusive right to fish beyond its territorial sea, nor can it base its pretended right to extend the limits of such sea, for the advantage of its citizens, upon treaties or immemorial possession contrary to the principles of "common" law, which recognize the liberty of fishing on the high seas.

1002. Conventions concluded between two or more states to regulate fishing beyond their respective territorial waters cannot be considered as binding except with respect to the citizens of the contracting states.

It is unquestionable that two or more states may by common agreement regulate fishing by their respective citizens in the marginal waters of their territorial sea and may establish conventional rules in their common interest. Nevertheless, this cannot render obligatory upon other states regulations thus established. In effect, so far as third powers are concerned, the convention should be held *res inter alios acta*. It could not, therefore, have any legal value to modify the principles of common international law which assure the liberty of fishing on the high seas. The claims of certain states, based on immemorial usage (such as those, for instance, of Denmark, which claimed the monopoly of open sea fishing over the whole of the sea of Greenland), must be regarded as contrary to the principles of international law.

1003. States which, in order either to regulate open sea fishing in their common interest or to prevent conflicts between their respective citizens engaged in that industry, adopt to that end regulations applicable beyond their territorial waters and provide punishment for violations thereof, committing to their war vessels the enforcement of rules thus established, cannot consider such regulations applicable to the ships that do not belong to the merchant marine of the contracting states.

An example of such a convention is that concluded May 6, 1882, between Belgium, Denmark, France, Germany, Great Britain and Holland, to regulate

fishing in the North Sea beyond territorial waters. It goes without saying that such treaty cannot give any jurisdiction over the ships of states other than those which signed it.

**1004.** Treaties concluded to regulate fishing in the open sea, in so far as they derogate from the principles of "common" law relating to the freedom of the sea, must, as regards their validity between the contracting parties, be strictly construed, as must every conventional clause which implies a limitation upon the free exercise of a right.

Compare, as regards the questions that arose with respect to fishing in the Behring Sea, the award handed down August 15, 1893, by the tribunal of arbitration; Calvo, *Droit international*, v. 6, Supplément général, §§ 379 *et seq.*; Fiore, *Diritto internazionale pubblico*, 4th ed., v. II, *Appendix*, p. 607; Oppenheim, *International law*, v. I, 2d ed., p. 351.

#### LAKES

**1005.** Lakes situated between several states and accessible from the river by which they are formed or from the sea, and navigable like international rivers, must be considered as common property and come within the application of the principles relating to the navigation of international waters.

When situated between the territories of several states, but not accessible from the sea, they come under the rules relating to the liberty of navigation and fishing of the states to which belong the surrounding landed territories.

In the treaty of Berlin of February 26, 1885, the rules relating to the liberty of commerce in the Congo basin were declared applicable (article 2) to the navigation of all the rivers that disembogue into the sea and to all the waters of the Congo and its tributaries, including lakes. In article 15, the régime established for the navigation of rivers is declared equally applicable to the tributaries of the Congo River and to lakes. One of the great lakes of North America, Lake Ontario, which belongs partly to the state of New York and partly to Canada, is subject to special regulations of navigation under the treaty of Washington of June 5, 1854, article 5.

As to lakes surrounded by the territories of several states, we are of the opinion that they must be deemed common property so far as such states are concerned and must be governed by the rules applicable to common property. (See rules 1098 *et seq.*)

#### FREEDOM OF NAVIGATION

**1006.** Any ship may navigate freely in the ocean and the waters which are not within the jurisdiction of any state, on condition,

however, of complying with the rules of "common" law relating to navigation on the high seas.

All waters that cannot be regarded as within the territorial dominion of a state must, according to natural law, be deemed as intended to serve the needs of those who wish to use them, the same as light, air and natural heat. Therefore, the principles which relate to the freedom of navigation must be applicable to all free waters, whether those of the sea, of a lake or of a river.

**1007.** Any limitation upon or obstacle to the freedom of navigation in free waters imposed by a state, as well as any act of sovereignty or jurisdiction on the part of the said state that may not be justified under the principles of "common" law, must be regarded as violations of the freedom of the sea and involve the international responsibility of the state.

**1008.** It must be considered as contrary to the freedom of the sea and of navigation to require from ships encountered on the high seas, whether they belong to the merchant marine or are minor war vessels, an obligatory salute or any other act which might indicate their dependence upon or subjection to war vessels of another state.

#### CONTROL ON THE HIGH SEAS DURING THE VOYAGE

**1009.** Supervision and control of navigation during the voyage on the high seas must be regarded as assigned to the war vessels of every state, confined exclusively, however, to the ships of its national merchant marine. Any derogation from this principle of "common" law can only be established through a special convention, applicable by reciprocity among the assenting states.

**1010.** The internal control of the ship during the voyage must be considered as committed to the person in command. He has the right to preserve order and discipline on board and to assure the safety of passengers.

**1011.** Any person going on board, whether a citizen or a foreigner, is bound to comply with the laws and regulations provided by the sovereign of the state of the flag of the ship and to recognize during the passage the authority of the persons who, under the law, are empowered to maintain order and control on board, save his right, on landing, to protest against any abuse of power on the part of such persons.

**1012.** It is the duty of the sovereign of every state to determine

by special laws the powers of every commander of a national vessel, during the voyage, with respect to the crew and the passengers.

**1013.** In no case can the commander of the vessel prevent anyone from freely protesting against acts occurring during the voyage.

The commander is not bound to delay the voyage, but he cannot prevent or hinder the landing at a port of call of the person who desires to land for the purpose of making protest before the maritime or consular authorities. Any act of violence on his part in that respect must be considered as arbitrary and as a violation of the rules of "common" international law.

#### NATIONALITY OF THE SHIP

**1014.** Every ship must have its own character and be in a position to establish the state to which it must be considered as belonging and whose flag it has the right to fly.

The national character of merchant ships must be determined by means of a certificate of nationality or passport which every vessel must have among its ship's papers.

With regard to war vessels, their nationality must appear from the military flag, which they have the right to fly and which is considered as covering them.

**1015.** The requisites and form of the documentary evidence of nationality are to be determined according to the law of each country. We must consider, therefore, as possessing the nationality of a state any ship which is legally in possession of the document of nationality required under the laws and regulations of the state to which she claims to belong.

#### SHIP'S PAPERS

**1016.** The papers that ships as a rule must have are:

- (a) The certificate establishing their identity, indicating their name, class and tonnage;
- (b) The certificate authorizing them to navigate under the national flag, which is called the certificate of nationality or passport;
- (c) The bill of sale or certificate of ownership of the vessel;
- (d) The crew list;

- (e) The ship's inventory;
- (f) The log book;
- (g) The charter-party and bills of lading;

These documents may be drawn up in various forms and may be included in one document.

With regard to the papers that Italian merchant ships must possess, see *Codice di marina mercantile*, arts. 37 *et seq.*, and *Codice di commercio*, arts. 500 and 503.

#### INTERNATIONAL RULES OF NAVIGATION

1017. The international rules of navigation are those agreed upon in a treaty and those which, in the absence of treaty, are the result of usage, the practice of mariners and the exigencies of navigation.

1018. The rules of navigation must aim at preventing collisions at sea and when the ships enter and leave ports. They must regulate the maritime route, the signals intended to prevent disasters, speed, the management and steering of ships and everything necessary to insure safe navigation.

The regulations which seek to avoid collisions, while not signed at the same time by all the states that have successively accepted them, have, however, the character of an international act, because in fact at the present time they represent the "common" law of a great many states. In effect, they have been accepted by Belgium, Chile, Denmark, France, Great Britain, Greece, Italy, Norway, the Netherlands, Portugal, Russia, Spain, Sweden (the United States made the reservation that within American territorial waters certain special rules of American law are to be observed) and Turkey (under reservation that, on Ottoman ships, a drum should be substituted for the bell for fog signals). Other states have adopted these regulations, which in Italy became operative September 1, 1880, under royal decree of April 4, 1880 (no. 5390, series 2 of the session laws), with the exception of article 10, repealed by the new decree of July 2, 1882 (*id.*, no. 882, series 3), which was replaced by art. 9 of the regulation approved by royal decree of February 1, 1883 (*id.*, no. 1143), which refers to fishing vessels.

1019. Every ship of one of the nations which have declared the rules of navigation obligatory upon their respective ships is bound scrupulously to comply with such regulations, and in case of non-compliance must be presumed guilty of and responsible for all the injurious consequences thereof.

1020. Nevertheless, when, owing to special circumstances, it may be considered necessary to depart from the rules prescribed in the navigation regulations to prevent or to avoid an impending

danger or to take precautions immediately necessary for her own safety, the ship which has not observed the rules may offset the presumption of culpability by proving that it has followed the practice of mariners in the special circumstances of the case.

This rule aims to prevent disasters and, especially, collisions which might under certain exceptional circumstances follow the formal and literal execution of the rules adopted to prevent collisions. Let us suppose, for instance, that it is proved that a ship, able easily to carry out a maneuver that she was not obliged under the rules to execute, but which, according to the practice of the sea was necessary, in the circumstances in which she was placed, to avoid a collision, has performed such maneuver, owing to the great difficulty for the other ship to go through the maneuver required under the rules; in such circumstances, even if the collision could not have been avoided, it would not be just to invoke the presumption of culpability against the ship which had not observed the rule, when an established custom of the sea required her so to act.

#### RULES CONCERNING SIGNALS

**1021.** Ships of the states that have accepted the international signal code, are bound to comply with the provisions of the code.

The international signal code for ships was drawn up in 1856 by the Anglo-French Commission, taking into account the signals adopted by different states, which were then classified after a thorough examination and brought into one code. Several states have successively adopted it: Great Britain (April, 1857), France (June 2, 1866), Russia (June 28, 1867), Netherlands (January, 1867), Austria (April 4, 1867) Sweden and Norway (May 18, 1867), Prussia (May 3, 1867), Brazil (February 21, 1868) Portugal (December 29, 1868), Italy (April 4, 1869), Belgium (December 18, 1869), Denmark (March, 1870), Spain (June 1, 1871), Turkey (March 31, 1880), Greece (April 26, 1882). The United States accepted the provisions of the Code in principle (1873), but did not formally adhere thereto.

#### REVISION OF THE NAVIGATION REGULATIONS

**1022.** It is incumbent upon the states which have accepted the regulations designed to avoid collisions to determine, establish and enforce the rules relating to the construction and equipment of ships which, according to the principles of modern science, may be considered as useful in avoiding collisions, rendering their consequences less disastrous and facilitating the management of ships so as to prevent maritime disasters.

It might be advantageous for that purpose to create an international technical commission to revise, perfect and complete the regulations in force.

## RATIONAL RULES OF MARITIME COURSES OR ROUTES

**1023.** Every ship, independently of the international regulations compulsory upon the ships of the states which have accepted them, is bound to comply during the voyage with the rules deemed binding according to the practice of mariners and the requirements of navigation.

## RULES CONCERNING SIGNAL LIGHTS

**1024.** Every steamship must have a signal-light placed at a certain height and sufficiently luminous to be visible on a dark night and clear atmosphere at a distance of at least five miles, and projecting light uniformly and without interruption. It must also have on each side a light visible on a dark night and clear atmosphere, at a distance of at least two miles.

These lights must remain burning from sunset to sunrise, regardless of atmospheric conditions.

**1025.** Every sailing vessel must carry on the foremast and on both sides, three lights casting a light visible on a dark night and clear atmosphere at the same distance as in the case of steamships.

**1026.** Steam and sailing vessels, when at anchor, must have a light so placed as to cast a light visible from all points of the horizon and at a distance of at least one mile.

**1027.** Fishing boats and all small craft must carry a visible light on both sides, casting a light discernible at a sufficient distance to avoid collisions on the part of steam or sailing ships approaching them.

## FOG SIGNALS

**1028.** Every steam or sailing vessel, although not belonging to one of the states which have accepted the signal code, must be provided with an instrument capable of producing a sound that can be heard at a reasonable distance, so as to avoid collisions in fog or thick weather, or in case of snow, and must signal both in daytime and at night at intervals not exceeding two minutes.

These signals, according to maritime practice, are the fog horn, the bells, the drum and other similar instruments capable of producing a sharp and prolonged sound, and whose transmission can-



- not be prevented by atmospheric conditions or by reason of the fact that the body producing the sound is situated on the ship.

#### GENERAL RULES FOR DIRECTING AND MANAGING A SHIP

**1029.** All ships following opposite or almost opposite courses proceeding toward each other and running the danger of collision are bound, independently of the obligation of complying with the regulations, to maneuver according to the rules accepted in practice by mariners, so as to leave the way free to the other ship and thus avoid the risk of a collision.

The rules are as follows:

(a) A vessel which sails in the open sea must leave the course free to a vessel which runs close upon the wind;

(b) A vessel which is close upon the larboard tack must leave the course free to the vessel which is close upon the starboard tack;

(c) When two vessels sail in the open sea, but with different tacks, the one which has larboard wind must leave the course free to the other;

(d) When two vessels sail in the open sea, both having the wind on the same side, the one which runs windward must leave the course free to the one which runs leeward;

(e) Vessels running with wind aft must leave the course free to any other;

(f) If two steam boats follow routes which so cross each other as to involve a risk of collision the vessel that has the other on the starboard must give the latter a free course;

(g) If two vessels, one a sailing vessel and the other a steamship, navigate in such directions as to run the risk of colliding, the steamship must clear the way for the sailing vessel.

(h) Any steamship approaching another so as to cause the fear of collision must slacken her speed or stop, or even reverse the engines, if necessary;

(i) Any ship overtaking another must keep outside the latter's track.

#### RULES OF NAVIGATION IN TERRITORIAL WATERS

**1030.** Every state may require foreign ships which enter its territorial waters to observe not only the general rules of naviga-

tion, but also the special rules that it prescribes for the carrying on of commerce within its waters, and ships which have not complied with such rules cannot avoid the presumption of fault for disasters resulting from their non-observance.

The United States, when adhering to the common regulations relating to navigation, made the reservation that, in the matter of navigation within the territorial waters of the United States, the laws and regulations provided for by the Union to avoid collisions within its territorial sea, as specified in section 4233 of the Revised Statutes of the United States, must be observed.

#### RESPONSIBILITY FOR COLLISION

**1031.** Any vessel which has not observed the rules of navigation according to the international regulations or those which must be considered compulsory according to the common practice of mariners to avoid collisions, will be presumed at fault and be held responsible for the damage resulting from the collision.

Such vessel will also be answerable for her fault and even negligence, when she has omitted the precautions required by the common practice of mariners and by the special circumstances of the case.

#### DISTRIBUTION OF DAMAGES IN CASE OF COLLISION

**1032.** States must establish by common agreement the regulations relating to damage and loss in case of collision and determine how and in what proportions the damages must be borne, distributed or made good.

Until such regulations have been drawn up, the following rules may be considered as conformable to just principles:

(a) If the collision is the result of *force majeure*, the damage and loss arising therefrom must be borne by the ship that has sustained them, without right or claim to contribution;

(b) If the collision is due to the fault of one of the ships, the damage and loss must be borne by the ship in fault, determined in conformity with its national law;

(c) A collision occurring in territorial waters, rivers and ports, between ships of different nationalities, must be regulated according to the law of the place of collision.

(d) When the collision has taken place in territorial waters

between two ships of the same nationality, the territorial law will be applied to determine the fault and responsibility, and the national law of the ships, to fix the apportionment of the damages;

(e) If the collision has occurred on the high seas between ships of different nationalities, and if it is not ascertained to which of the two vessels the fault is chargeable, or if the fault is common to both, the damages to the ships and their cargoes must be added together and borne by each in proportion to the respective value of the ship and the cargo;

(f) In case of a collision where the fault is in doubt or of a collision chargeable to both, occurring on the high seas between ships of the same nationality, the national law of the ships must be applied, even when a foreign court passes upon the case.

At the Congress of Antwerp, the following rule was proposed: "If the vessels are of different nationality, in case of a collision on the high seas chargeable to the fault of both or when it is not certain to which of the ships the fault is chargeable, each ship is bound within the limits of the law of her own flag and cannot receive more than that law allows her."

See, for observations concerning this rule and for reasons which might be invoked in support of the one we propose: Fiore, *De l'abordage des navires suivant le droit international* in *Revue du droit public*, v. 3, 1895, p. 293.

#### RULES CONCERNING THE COMPETENT COURT

1033. States must draw up in common agreement uniform rules relating to the jurisdiction of litigation relating to collisions.

In the absence of such an agreement, the following rules may be considered as conforming with correct principles:

(a) The courts of each state are competent to pass upon cases relating to collisions occurring in territorial waters or on the high seas between national vessels;

(b) They are also competent to pass upon collisions on the high seas between ships of different nationalities, when the damaged ship has been compelled to seek refuge in one of the ports of the state;

(c) When the damaged ship has not been forced by circumstances to take refuge in the nearest port, the action must be brought before the court of the place of destination, if the ship at fault or her owner or his representative is there; otherwise, the ordinary rules of jurisdiction must be observed;

(d) The court of the place where the ship at fault is seized is considered competent;

(e) The authorities of the port of refuge and of the place of destination of the damaged ship will always be competent to receive the report of the ship's master and to draw up the protest necessary for the bringing of the action, to take depositions of witnesses, to order a technical survey, to ascertain the damages and to perform all the acts of investigation necessary to determine the responsibilities.

## TITLE II

### PUBLIC PROPERTY IN ITS RELATIONS WITH INTERNATIONAL LAW

#### GENERAL PRINCIPLES

**1034.** Public property is corporeal or incorporeal. The former consists of material things of which each state has the exclusive legal possession as against other states. The latter consists of property which each state enjoys exclusively, that is, things that the sovereign has within his control and may dispose of for the needs of the commonwealth.

Modern systems of legislation have admitted the distinction drawn by Justinian between the *res publicæ* and the *res universitatis* (Inst., lib. 2, tit. 1). They admit, therefore, that the state may enjoy *uti singulus* certain property which it owns, while it may enjoy other things only *uti cives*. This distinction is a matter of public internal law, according to which the property of the state is divided into property merely under its eminent dominion and property of which it has title and of which it may or may not dispose. In international law, there is no such distinction. The question is to determine the right of each state over the whole public property concurrently with the other states which exist with it in the *Magna civitas*. Consequently, the distinction which we have made seems to us sufficient.

**1035.** International law, while recognizing that the sovereign of each state has an exclusive right over the things which constitute the property of the state, must determine also how each sovereign state must make use of and enjoy its rights over that property so as not to cause any prejudice to the interests of the states and peoples which co-exist with it in the *Magna civitas*.

The state cannot be deemed to own the things which constitute its patrimony, for its right over such things lacks the essential character of property, the absolute power to dispose of it. The patrimonial rights of the state are subject to the limitations prescribed by the laws that protect public interests and the rights of the state. In external relations, as the exercise of the patrimonial rights of each state may compete with the interests of other states, it is indispensable that international law should regulate their exercise and enjoyment in conformity with the requirements of the existence in common of all the members of the *Magna civitas*.

## THINGS IN THE LEGAL POSSESSION OF EVERY STATE

1036. We must regard as in the exclusive legal possession of every state the things over which the state has eminent domain, with the power to retain possession thereof and to defend it against other states.

These things consist of:

- (a) Physical territory;
- (b) Sea, river and lake waters, as far as their boundary line, called territorial waters;
- (c) Colonial possessions;
- (d) War vessels which, combined, constitute the fleet;
- (e) The islands that are located in territorial waters.

1037. Legal possession on the part of a state is effected through the assertion of its sovereignty over things taken as a whole *uti universitas*; and must be regarded as extending to the frontier which constitutes the line of separation between the territory of two contiguous countries.

Possession as exercised by a state cannot be compared with that exercised by a private individual. In order that possession may be considered as effected by a private individual, it is an essential condition in the first place that he control the thing with the intention of exercising a right over it. Consequently, possession may be considered as valid only if the possessor has the physical disposition of the thing. On the other hand, as regards the sovereign state, possession must be considered as effected through the assertion of the right of dominion. Thus, it follows that a sovereign state may be in legal possession of a whole continent and of its colonial possessions by the mere fact that it asserts through sovereign acts its dominion over such territories with the intention of maintaining their possession and of defending it against the world. Therefore, the possession of the state extends over all the things that are under its rule and over all its territory, whatever its extent, as far as the boundary line, beyond which are asserted the sovereign rights of another state.

## TERRITORY OF THE STATE

1038. The physical territory of the state is constituted by all the contiguous land comprised within the limits of the region subject to its sovereignty.

## TERRITORIAL WATERS

1039. Territorial waters, that is to say, those contained between the shores of a state and the line that constitutes its maritime or

river boundary, must be deemed to be in the juridical possession of the territorial sovereign. That sovereign has the right in these waters to regulate navigation, transit, the landing of national and foreign vessels according to the established laws and regulations, and to insure their enforcement, without, however, preventing or obstructing the peaceful use of the said waters.

See with respect to the right of dominion of the sovereign state over territorial waters, rules 265 *et seq.*; on criminal jurisdiction, see rules 306 *et seq.*

#### COLONIAL POSSESSIONS

**1040.** Colonial possessions must be deemed within the legal possession of the state to which they belong, in the same manner as any other portion of the real territory of the state, so far as the exercise of its sovereign rights is concerned.

**1041.** The rights of the state over the colonies as against the rights of third powers must be considered as coming under the application of the rules that relate to the exercise of the rights of the different states over their respective territories.

#### GOVERNMENT OF COLONIES

**1042.** The administrative and economic government of each colony must be deemed within the exclusive domain of the public law of each country.

No state, however, may, without committing an arbitrary act, so organize the government of its colonies as to disregard the international rights of man, which cannot be denied to colonists and must be under the protection of international law.

Compare rule 109.

**1043.** A state which, for the purpose of deriving an undue advantage out of its colonial possessions, sanctions by its law the civil, economic and political servitude of the colonists and disregards, to their prejudice, the fundamental rights of civilized peoples, violates international law.

The subservience of colonies, as understood and practiced by some governments which were impelled by mercantile greed to found and to maintain colonies so as to enrich themselves at the expense of colonists, is contrary to the principles of modern law. The fact that colonists might have been con-

sidered outside the "common" law of civilized peoples, up to the point of denying them the free enjoyment of the rights of man, may have contributed toward the colonial policy of organizing labor in the colonies and commercial monopoly for the exclusive profit of the mother country, and of maintaining the civil and political servitude of colonists. The development of civilization must, however, naturally lead to the suppression of the system of perpetual subjection, which was called colonial servitude, and justify the emancipation of colonies.

The relation between the colony and the mother-country must be regarded as within the domain of public internal law. Nevertheless, it must be admitted that the autonomy inherent in every sovereign state cannot justify the violation of the rights of the human person, which must be respected and protected even with respect to population less civilized than the colonists. Arbitrary violation of those rights and the powerlessness of the colonists to assure their respect might justify collective intervention according to the rules hereinbefore mentioned.

See rules 556 *et seq.*

#### ISLANDS

1044. Islands that may form in territorial waters should be considered in the legal possession of the state to which such waters belong.

Those which may form in the territorial waters of a river belonging to several states should be considered in the legal possession of each of the riparian states so far as they lie within the respective boundary lines.

Those which form at the mouth of a river must be deemed in the legal possession of the state to which belongs the territory where the river disembogues into the sea and are to be regarded as a dependency of the mainland even when they are unoccupied.

Compare: Perels, *Droit maritime*, translated by Brendt, who cites in connection with the last part of the rule the decision of the Supreme Court of Prussia of November 28, 1860.

#### BOUNDARY OF THE TERRITORY

1045. The boundary of every state is formed by the line of separation which determines the limit of its territory and of that of the contiguous state.

The line which constitutes the limit or boundary of contiguous territories may be fixed according to a natural or conventional demarcation.

The former must be regarded as indicated by the nature of the region, the position of things and the geographical structure of the



land. The latter may be established as the result of a reciprocal agreement of the interested parties.

1046. The boundary of every state must be considered as permanently fixed when the states agree upon visible monuments, or in their absence, when the separation line is fixed by arbitrators who, taking into account both natural lines and rights respectively vested, lay out the boundary by erecting visible monuments.

1047. When the boundary line is marked, the following rules may be observed:

(a) To trace the boundary line by observance of the mathematical line, but avoiding an unreasonable and harsh rigorism, and taking into account the unevenness of the ground, the nature of cultivated soil and the requirements of agriculture, subordinating, however, the strictly mathematical line to considerations of equity;

(b) Not to complicate the difficulty by verifying long established boundaries, whose visible signs may have disappeared, and to confine the work to the tracing of the boundary in the parts where an actual uncertainty exists.

(c) To correct the lines traced by nature, when necessary in order not to separate a connected series of works or cultivated land.

#### BOUNDARY LINE AS REGARDS CONTERMINOUS MOUNTAINS

1048. When two or more states are separated by a mountain range and the boundary line is not determined by treaties, or indicated by visible monuments, each state must be regarded as entitled to the slope situated on its side from the culminating point or summit, and the water shed must be taken into account in fixing the respective limits.

The line determined by the water discharge (water-shed line) is, in our opinion, the line that should serve to establish the boundary of the mountains or of the mountain range separating states. This line may sometimes differ from that indicated by the culminating points, as the water shed is determined by the inclination of the slopes on one side or the other.

#### MARITIME BOUNDARY

1049. The maritime boundary must be considered as fixed with respect to any state by the limit established in conformity with

customary law, or the limit which may be established by an international convention determining the extent of territorial waters.

Compare rules 279 *et seq.*

**1050.** When territorial waters are in the dominion of two states, as may be the case when the territory crossed by an open sea belongs on the one side to one state and on the other to the other state and the sea is so narrow that it constitutes the territorial waters of both countries, or when the mouth of a river is in the limits of two states, the boundary line of such common waters must be determined by common agreement, taking into account the median line between the shores of the two states.

#### BOUNDARY LINE WITH RESPECT TO COMMON NON-NAVIGABLE RIVERS

**1051.** When two or more states are separated by a common non-navigable river, the boundary of the two contiguous states must be considered as established by the intersecting line, called the *thalweg*. This line must be regarded as determined by the median part of the current at the point where the stream flows with the greatest speed.

The *thalweg* unquestionably is not the middle part of the stream, but is determined by the intersecting line of the currents of greatest volume on both sides. It may be subject to deviations determined by the depth of the river bed at different points, and may be established in navigable rivers by observing the route of the boats of greatest tonnage.

**1052.** If the river should abandon its old bed and form a new one, the boundary of the two states ought to be considered as remaining fixed as before with regard to the old bed.

If a gradual change has taken place in the course of the river, the median line should be regarded as changed and each of the two states must suffer either a diminution of territory or profit by the actual accretion.

#### BOUNDARY LINE OF NAVIGABLE INTERNATIONAL RIVERS

**1053.** The boundary line, as regards riparian states, of an international river must be fixed at the limit of territorial waters, observing the same rules as for the maritime boundary. Waters beyond this limit should be assimilated to the open sea.

When, owing to its narrowness, the middle of the river is not situated beyond the respective territorial waters of the riparian states, their boundary ought to be established by application of rule 1051.

BOUNDARY LINE WITH REGARD TO ISLANDS

**1054.** As to the islands that form in the middle of a river, the boundary line must be established by taking into account the *thalweg*, which ought to serve as a basis to determine the line of division and boundary between the two riparian states.

## TITLE III

### METHODS OF ACQUIRING TERRITORY

**1055.** Territory may be acquired by a state:

- (a) By annexing another state;
- (b) By voluntary cession of a part of its territory, with or without compensation, by the state to which it belonged;
- (c) By compulsory cession, imposed as a condition of peace and regulated by a treaty duly ratified;
- (d) By the primary methods of acquisition, namely, occupation, accession and usucaption.

**1056.** Conquest cannot be regarded as a legal method of acquiring territory, nor can peaceful conquest under the form of expansion or colonial protectorate, in violation of the principles of "common" law, be regarded as legitimate.

See in this work, rules 1082 *et seq.*; Oppenheim, *International Law*, v. I, 2d ed., p. 281 *et seq.*

#### ANNEXATION

**1057.** When an autonomous state is incorporated into another, voluntarily or by force, all its territory becomes an integral part of the state to which it is annexed. This territory must be considered as in the legal possession of the state to which it is annexed from the moment the incorporation became effective.

There are numerous examples of annexation of one state to another. The independent state of Texas was annexed in 1845 by the United States. Likewise Hanover was, in 1866, incorporated with Prussia, at the same time with the Electorate of Hesse and the Duchy of Nassau.

On the consequences of annexation as regards the exercise of sovereign rights, see rules 140 *et seq.*

#### CESSION

**1058.** Cession of a portion of territory voluntarily transferred by a sovereign in conformity with constitutional law produces, from

the moment it has become effective by actual possession of the state to which it is ceded, the acquisition of that territory which then becomes an integral part of the domain of the transferee state. Compulsory cession imposed as a condition of peace produces the same effect from the execution of the treaty and its actual possession by the transferee state.

For the legal consequences of cession with regard to the exercise of sovereign rights of the ceding state to the transferee state, and of the rights of the inhabitants of the ceded territory, see rules 147 *et seq.*

#### ACQUISITION OF TERRITORY BY OCCUPATION

**1059.** The acquisition of territory by occupation can only take place in regions which are not in the legal possession of another state.

**1060.** Countries which are a part of a continent inhabited by civilized peoples with an established government, although not actually occupied by the people, cannot be regarded as unoccupied territory. Consequently the claim of a state which undertakes to apply to such regions the principles governing unoccupied territory must be regarded as contrary to international law.

Compare rules 1036 and 1037.

**1061.** Countries which are not in the legal possession of any civilized state, but which are inhabited by savage tribes may be acquired by occupation; limiting it, however, to the portions of territory unused by the natives and in which, by reason of the disproportion between their area and their needs, they cannot apply the ordinary means of exploitation to render them productive.

**1062.** Occupation by force of a country actually inhabited by savage tribes must be considered as a disguised form of conquest.

Any state which desires to occupy territory inhabited by uncivilized tribes, without violating international law, must negotiate with them and obtain a cession by payment of compensation. Moreover, while always excluding every form of violence against persons and every other violent means of forcing the natives to cede their surplus territory, the indirect and passive means for inducing them to yield their territory to colonization must be regarded as lawful.

Countries inhabited by savage tribes, governed by chiefs elected according to their custom, must be regarded as invested with sovereign power and cannot in truth be considered as territories without a sovereign. Therefore, we cannot, in principle, admit that the occupation of these countries can take place in the same way as in countries actually unoccupied, however praiseworthy may be the object of states desiring to occupy these countries for the purposes of civilization. We cannot, indeed, admit that civilization may be promoted by armed force. Our rule, therefore, seeks to render obligatory the qualifications mentioned.

**1063.** A state which has succeeded in occupying a country by any method, and which intends to retain possession, is bound to notify the *fait accompli* through diplomatic channels in order to put the other states upon notice to enter contesting claims. They must, moreover, establish in the country occupied an authority clothed with sufficient power to maintain order and to assure the freedom of commerce.

In the general and final act of the Conference of Berlin, signed February 26, 1885, by Austria, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Luxemburg, Portugal, Russia, Spain, Sweden, Norway, Turkey and the United States, the following rules were established for the subsequent occupation of regions of the African continent:

Art. 34. The power which henceforth takes possession of a tract of land on the coasts of the African continent, outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as a power which assumes a protectorate there, shall accompany the respective act with a notification thereof addressed to the other signatory powers of the present act, in order to enable them, if need be, to make good any claims of their own.

Art. 35. The signatory powers of the present act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon.

#### WHEN OCCUPATION MAY BE CONSIDERED AS EFFECTIVELY ESTABLISHED

**1064.** Every state may undertake to bring about the exploration of deserted countries which are not in the domain of another state and to effect the occupation thereof with the intention of acquiring sovereignty.

**1065.** Occupation can be effected only by effective possession, uninterrupted and permanent, of the territory desired, in the name of the state. This effective possession cannot arise from a mere diplomatic notification. The actual exercise of sovereign power is indispensable.

By the terms of articles 34 and 35 of the general act of the Conference of Berlin above mentioned, the diplomatic notification is required to confirm the taking of possession; but possession can be considered as effective only when the occupying state establishes in the occupied territory an authority capable of assuring respect for the rights acquired and for the freedom of trade and transit.

**1066.** The taking possession of regions discovered by explorers, in the name of their country, cannot suffice to make effective an occupation by the state, unless the latter has, in fact, undertaken acts in its own name to confirm its rights of sovereignty over these regions. Indeed, the exercise of sovereign rights in some effective and permanent manner is always necessary to establish the acquisition of newly discovered territory.

**1067.** Discovery of a country by unauthorized individuals without the support or approval of their government may be considered as sufficient to accord to the state of which they are citizens the right of occupying this region in preference to any other state. It is, however, incumbent upon the government which has been notified of the discovery and which proposes to profit by it, to notify, through diplomatic channels, its intention to occupy the newly discovered territory; and it is always essential that it take possession and exercise sovereign rights in the territory to render its occupation effective.

Even if the individuals who have discovered a new territory have raised thereon the national flag or left an inscription on a monument erected by them, or set up other evidences of discovery to fix the priority thereof, they cannot be considered by this fact alone as having established occupation in the name of their national state. It is always indispensable that the state exercise sovereign rights in its own name.

**1068.** The period within which the state must, in order to render its occupation effective, proceed with the occupation of territory discovered by its nationals should be established uniformly by a Congress. In the absence of such an agreement, however, after the expiration of a reasonable time for occupation, if the government has undertaken no act with that end in view, it must be presumed that it has tacitly renounced its right of preference.

**1069.** Inasmuch as the occupation must take effect by means of acts of possession or appropriation carried out in the name of the state, the acquisition of territory must extend to all parts which,

according to rational principle, the nature of things and the physical configuration of the country, constitute a whole.

Compare rule 1037.

#### EXTENT OF OCCUPATION

**1070.** The effects of taking possession or appropriation cannot extend to places where there already exist rights acquired by another state, even though unexercised, unless there is a presumption of abandonment.

**1071.** A state which is in legal possession of the mouth of a river cannot thereby be considered as having occupied the entire hydrographic basin of the river, if it has undertaken no act of sovereignty or appropriation with respect to the various regions which are parts of the basin.

The hydrographic basin of a river is very complex and may comprise territory completely distinct, according to the hydrography and the orography. Therefore, on principle, the possession of the mouth of a river cannot imply the occupation and acquisition of the entire basin of the river. This difficulty was prominent in the controversy between the United States and Spain with respect to the western boundary of Louisiana in 1815, and in that between Great Britain and the United States with respect to the Oregon territory in 1846.

It is freely admitted that when a state possesses the mouth of a navigable river, it has within its control a natural instrument for penetrating into the entire region constituting the basin, but it cannot be admitted that the possession of the mouth alone involves possession of all the country comprising the hydrographic basin, although by reason of their hydrographic and orographic configuration they constitute a single and homogeneous whole.

**1072.** A state which, without violating the principles of "common" law, has occupied the regions occupied by savage tribes not formed into a political association, and which has appropriated the territory, may be considered as having effected the acquisition of all the country inhabited by the barbarous tribes which have recognized its sovereignty.

The legal possession of the regions occupied must be considered also as extending to those of which the occupying state has granted the use, under private title, to individuals. Consequently, a third power claiming to have acquired these regions, in whole or in part, from the natives, cannot thereby invalidate the rights already acquired by the first occupying state, confirmed by its appropriation of all the country, not excluding the territory



which it had already granted to the use and occupation of individuals.

#### ACQUISITION OF TERRITORY BY ACCESSION

**1073.** A state acquires the portions of land which, by natural causes, happen to unite in a permanent manner with the territory which is actually and effectively in its legal possession. As such portions of land we must consider the accretions which, through alluvion, form along the sea shore or the banks of a river, the islands which form within the limits of the territorial waters of a state, and the accretion, even if gradual, resulting from the shifting bed of a river.

**1074.** Islands which form at the mouth of a river, and especially deltas, must be regarded as acquired by acquisition by the state to which the nearest bank belongs.

In the Treaty of Berlin of 1878, article XLVI provides that "islands formed in the delta of the Danube, as well as the Island of Serpents, etc., shall belong to Roumania."

A controversy arose between the United States and Great Britain with respect to an island which had formed at the mouth of the Mississippi, which Great Britain claimed as its own by reason of discovery by an Englishman. In principle it cannot be assumed that islands, even though not occupied by the state within whose possession are the waters in which the island forms, can be regarded as *res nullius*. They must be considered as a dependent territory of the state and deemed to be comprised among the things within its legal possession.

**1075.** If, between two states separated by a watercourse, a considerable portion of territory belonging to one should be detached by force of a cataclysm and incorporated into the territory of another, the latter would acquire it by accession. Nevertheless, if the land detached were considerable and could be recognized, the acquiring state ought to pay an indemnity to the other state or to the private owners. And this indemnity ought to be fixed by treaty or submission to arbitration.

Should the lands carried away be woodland belonging to the state or private owners, and if a considerable quantity of wood had been carried off by the violence of the waters of the river to the opposite bank, the state or private individuals to whom the wood belonged might claim it and the other state would be obliged to restore it.

## ACQUISITION BY USUCAPTION

1076. Usucaption may be considered as a mode of acquisition with respect to certain contiguous regions which may be regarded as abandoned by the state to which they belong and which are effectively occupied in the name of an adjacent state.

1077. Usucaption can be effective between two states, so as to modify their respective rights over certain territory situated near their respective boundaries only when the state which claims to have acquired these territories by usucaption has actually occupied them and exercised sovereign rights in a notorious and continuous manner without opposition on the part of the other state and has exercised its legal possession uninterruptedly and for a sufficient length of time to legitimize its acquisition.

1078. The length of time should be established by agreement among the nations. In the absence of such agreement it must be fixed in such a way as to justify a presumption of the abandonment of sovereign rights on the part of the state against which title is claimed.

This presumption must be considered as founded on immemorial possession, but, if it concerns the acquisition of unimportant territory, a possession for fifty years might be considered as sufficient.

Many controversies concerning the acquisition of certain portions of the American continent took place between the European states which founded their respective rights upon occupation and upon long continued possession.

Compare Calvo, *Droit international public*, §§ 283 *et seq.*, §§ 1692 *et seq.*

## TITLE BY ACQUISITIVE PRESCRIPTION

1079. Acquisitive prescription cannot, in principle, be deemed a legal method of acquiring territorial sovereignty over a country, based upon the exercise of sovereign rights for a certain period. According to international law the claim of a third state which asserts a legitimate title to a given territory by acquisitive prescription cannot be supported. It may be admitted, however, that possession *de facto*, although not legally legitimate originally, if established and maintained during a considerable number of years, which should be definitely fixed, may ripen into a title by acquisition by virtue of the respect due to accomplished facts.

Acquisitive prescription is regulated by the civil law as a mode of acquisition among individuals. Nevertheless, it can be considered as based upon rational law, which is equally applicable to states constituting the international society.

See Fiore: *Nuovo Diritto internazionale pubblico, secondo i bisogni della civiltà moderna* (Milan, 1865), Sect. II, Chap. V, p. 181, and the translation of Pradier-Fodéré (Paris, 1868), pp. 389, 394; Fiore, *Parere giuridico sulla questione tra il Perù e l'Equatore*, Naples, 1906, pp. 52, 54.

1080. Any state which is in *de facto* possession of a territory may assert the right of continuing its possession and defending it. It may be regarded as a status of fact, to be respected by other states, so long as the third power which seeks to contest its possession has not established its own legitimate rights by conclusive proof.

1081. The claim of a third power contesting the *de facto* possession cannot be asserted during an indefinite period. A limit must be fixed, admitting that, in principle, time may validate everything and that one cannot indefinitely controvert the initial acquisition.

A *de facto* possession, maintained for a long period of years, fixed and determined, must be regarded as an obstacle to the admission of the contesting claim and may validate the acquisition by virtue of prescription.

International law does not furnish any rules for determining the number of years required for acquisitive prescription of sovereignty nor for ascertaining the required conditions. Nevertheless, we believe that the principle of prescription is indispensable in the interests of the security of states and the assurance of peace. Even though the original title of acquisition may be unlawful, if the *de facto* established possession could be forever contested, disastrous consequences would follow, with a veritable chaos among the states of Europe as well as of America. We admit, therefore, the necessity of some kind of acquisitive prescription in international law. There should be referred to the decision of a conference of states the delicate question of determining the conditions for its application and for the validity of *de facto* possession, as a final answer to the claim of another state. (See *infra*, concerning Conferences of states).

The principal, or substantial reasons, which ought to be the basis for decision in this matter, should be founded on the present state of facts concerning the territory in dispute. It would be necessary to ascertain whether the population has recognised the authority of the sovereign who has exercised authority there, and for how long a period the state has exercised its rights of control and jurisdiction over the country and the population.

1082. Acquisitive prescription can have no value in the acquisition of sovereign rights as against the people who inhabit a territory to take by prescription the absolute and intangible right of

the people to recognize or deny the sovereign power established and exercised over them.

This may find its application in connection with possessions acquired by conquest, colonial protectorate, or by means of spheres of influence (*hinterland*) although these measures do not constitute legitimate modes of acquisition.

See further, rules 1087 *et seq.*, and 1093.

Sovereign power belongs in reality to the people and can be exercised legitimately only by him who has been invested with superior authority by the people themselves. This, however, relates to the legitimate power established according to constitutional law and in this respect prescription is absolutely inoperative. Is the right of the people to govern themselves as they wish susceptible of prescription? No dynasty, however long its power may last, can establish its right as against the people by acquisitive prescription. On the other hand, from the point of view of international law, inasmuch as he who governs *de facto* must be considered as sovereign, it must be admitted that that fact, provided it be confirmed by long usage or duration, may constitute a just title to sovereignty.

#### CONQUEST

**1083.** Conquest, which consists in the occupation by force of the territory of another state, cannot *per se* be considered a legally valid title to the occupied territory. It must always be considered as illegal according to modern international law, whatever its purpose may be.

**1084.** Conquest can never be a legitimate purpose of war. It cannot be justified by the military occupation of a part of the enemy territory and by its forced cession, imposed upon the vanquished people as a condition of peace. It is necessary to apply the rules governing the validity of treaties of peace in order to decide whether the victor may appropriate a portion of the conquered territory.

Compare rules 241, 242, 559, and *infra*, concerning the validity of treaties of peace.

**1085.** No state may justify the right of conquest either by the theory of the balance of power or by invoking the utility of the formation of a great national state, or by the diffusion of civilization and promotion of progress. The appropriation of the territory of another state by force and its incorporation must be considered illegitimate under the principles of law.

**1086.** Although conquest *per se* cannot constitute a legitimate

mode of acquisition, nevertheless, when it is accomplished, when the new conditions have by degrees been gradually accepted by the population, and when the fact, illegal in its origin, has been gradually legalized, conquest may result in the acquisition of conquered territory, by reason of the necessity of accepting an established condition strengthened by time and of respecting accomplished facts.

Compare rules 1079, 1082, and the corresponding notes. See Oppenheim, *International Law*, § 236, 2d edition, pp. 302 *et seq.*

#### COLONIAL PROTECTORATE

**1087.** A protectorate may be deemed a legitimate mode of acquiring territory inhabited by uncivilized tribes only when established in accordance with the principles of conventional law and when notified to the other powers, indicating the regions over which it is asserted and showing that it does violate the principles of "common" law.

According to article 34 of the Treaty of Berlin of February 26, 1885, the state intending to assume a protectorate is obliged to notify the other powers signatory to the act that it has undertaken a protectorate over the country named; but, aside from such notification, the protectorate must become effective.

The protectorate over barbarous countries may be justified on the ground of promoting civilization. Hence, it is indispensable for the protecting state to effectively encourage the development of all kinds of civilizing activity in the regions under its protection. Should it do otherwise, and should the inactivity of the protecting state continue for an excessive period, another power cannot be denied the right of substituting itself for the protecting power. It seems to us, therefore, that the validity of a protectorate is subject to the application of the same rules as the validity of occupation. This is the basic idea of the rules which we have proposed.

**1088.** No state may establish a protectorate in Africa or in other uncivilized countries by mere notification. The protecting state must, in addition, undertake other acts to render its right effective, namely:

- (a) Establish a regular government, capable of protecting the rights of individuals and assuring the freedom of commerce;
- (b) Establish and assure order, peace and the exercise and legal enjoyment of rights;
- (c) Do everything which a state is bound to do in order to render occupation of territory by occupation valid.

**1089.** A mere verbal notification, not followed by any act of sovereignty and jurisdiction, cannot be regarded as an effective means of justifying the protectorate as an exclusive right, when such notification is not followed by other acts required to make it effective.

**1090.** The treaties concluded by the colonizing state with the natives who have ceded the sovereignty over the territory in which they live, assuming that the notification and the other rules above mentioned have not been observed, cannot *per se* legally constitute a valid cession upon which to base the legitimacy of the acquisition of territorial sovereignty.

It may be noted that cessions agreed upon with the natives cannot *per se* alone suffice for the acquisition of territorial sovereignty because barbarous tribes have not the same conception of sovereignty that prevails among civilized states and consequently cannot transfer what they are not conscious of possessing.

Compare rules 877 *et seq.*; Fiore, *Del Protettorato coloniale, Memoria alla Reale Accademia di Napoli*, v. XXVI, and *Trattato di diritto internazionale pubblico*, 4th ed., v. II Appendix, p. 628.

**1091.** The colonial protectorate, supposing it to be effectively established, cannot be deemed to extend beyond the limits within which it may be regarded as effective. Its extent must be determined in accordance with the rules applicable to the extension of title acquired by occupation.

If a protectorate could be acquired by mere notification it might comprise an enormous extent of territory, much in excess of that in which the protecting state may effectively exercise its sovereign rights. But the nominal protectorate does not seem to us sufficient to create an exclusive right in the protecting state which has proclaimed and notified it.

**1092.** It is within the domain of international law to determine the legal conception of a protectorate and to regulate it in accordance with sound principles, so that it may not become an expedient through which to effect, by unlawful means, the gradual expansion of the colonial possessions of any state, and thus justify a disguised form of conquest.

#### SPHERES OF INFLUENCE (HINTERLAND)

**1093.** The sphere of influence, established in common accord by a treaty in the interest of each of the contracting parties, cannot be deemed sufficient *per se* to attribute to the favored state

the right to acquire the territories indicated and comprised within the line established as the boundary of its colonial activity.

**1094.** Any state may voluntarily limit the development of its activity in barbarous countries to the advantage of another state, but the reciprocal obligations must be regarded as valid only between the contracting parties. They may not entitle either party to the right of territorial sovereignty over the territory within their respective spheres of influence.

The development of the activity of each state may lead to the acquisition of territorial sovereignty only when accomplished without violation of the principles of international law.

**1095.** The right to colonize and to extend colonial possessions in barbarous countries may be justified on grounds based upon moral, economic and political considerations, but on condition of maintaining intact the superior principles of justice and the supremacy of law.

The fundamental question of the right on the part of civilized states to colonize barbarous countries and to extend civilization by means of spheres of influence is naturally a complex one. It may rightfully be claimed that a certain ratio between the extent of territory and the number of its inhabitants is indispensable, and that it is extremely useful to open up new outlets to the activity of civilized peoples, in order to enable them to extend the field of their activity and production, so as to satisfy their ever increasing needs through an increase of wealth. Yet this could not justify the employment of any means to attain that noble end. It must always be remembered that in the *Magna civitas* the supremacy of law must be maintained intact, and that on civilized states is imposed the supreme duty of not disregarding the principles of international law in their relations with uncivilized peoples. The whole question of colonization and expansion by means of spheres of influence must be governed by these high conceptions.

**1096.** The sphere of influence recognized by one or more states in favor of another state can never be assumed to authorize the state in whose favor it is established to act with arbitrary freedom and to carry out a disguised conquest.

There are numerous treaties relating to spheres of influence, among which may be mentioned the following:

Germany and Great Britain, for East Africa and Zanzibar, of November 1, 1886, and July 1, 1890; and for Central Africa, of November 15, 1893.

Great Britain and Italy, for East Africa, of March 24, and April 15, 1891.

France and Portugal, for Guinea and Congo, of May 12, 1891.

Portugal and Congo, of May 25, 1891.

Great Britain and Portugal, for Central South Africa, of June 11, 1891.

Germany and Great Britain, of November 15, 1893, for determining their respective spheres of influence in the Gulf of Guinea.

Germany and France, of February 4, 1894, for determining their respective spheres of influence in the Lake Tchad region in Africa.

Compare: Despagnet, *Les occupations de territoires et le procédé de l'interland*; Bonfil, *Manuel de droit international public*, 3d ed., by Paul Fauchille, 1901, XV, 558; Ernest Nys, *Le droit international: Les principes, les théories, les faits*, v. II, pp. 28 *et seq.*

**1097.** International law must fix the legal organization of colonial policy and regulate by just principles the rational expansion of the respective domains of the colonizing states.

#### COMMUNITY OF INDIVISIBLE TERRITORY

**1098.** Community may take place between two or more states which have rights of property over an indivisible possession.

**1099.** Each of the states in common ownership is bound to do whatever is necessary to maintain the common possession under the conditions required for its final purpose, and not to do anything which may prevent its enjoyment or prejudice their respective interests.

This rule may find its application in the case of a bridge uniting two adjacent countries. Each has the right to prevent the other from injuring its own part of the bridge, rendering it unfit for use, and may require the other to undertake whatever may be necessary to render it fit for its purpose.

The rule may also be applied with respect to rivers flowing through or between two states. Thus, the upper state cannot alter a watercourse, stream or river, to the prejudice of the lower state; neither can it modify the watercourse by means of falls, or build any work likely to affect the flow of water or impair such flow through the territory of the lower state.

#### INTERNATIONAL SERVITUDES

**1100.** An international servitude is a territorial right in favor of one state over the territory of another state. It can be constituted only by virtue of a title.

There are many examples of international servitudes. Under the treaty of Utrecht of March 13–April 11, 1713, Great Britain, to which France ceded the island of Newfoundland, granted to France the right of fishing on certain shores of the island, and of using the banks to dry their fish, and of erecting on certain coasts buildings necessary to conduct the fishery. This servitude was confirmed in Article 5 of the Treaty of Paris of February 10, 1763, modified by the treaty of Westphalia of September 3, 1783. The fishery constituted the object of provisional agreements between France and Great Britain in 1857, 1884, 1885, 1890 and 1891, and gave rise to a convention of arbitration signed at London March 11, 1891.

Another example of such servitude is found in the right of passage granted to Prussia to communicate with its Rhenish provinces, which it could reach only through Brunswick, Hanover and Hesse.



Another case of international servitude is contained in the treaty concluded in 1873 between Russia, the Emir of Bokhara and the Khan of Khiva, by which Russia acquired the right to build bridges, custom houses and landings on the left bank of the Amu-Daria.

These servitudes, which are true territorial servitudes, must not be confused with others, also named international servitudes, but which, in reality, are limitations of the right of sovereignty and consist in the fulfillment of a personal obligation, such as the dismantling of fortresses, or the construction of certain works to maintain a strait in a navigable condition. A servitude proper always implies the active exercise of a territorial right and a passive obligation on the part of the servient state.

The name servitude is also applied to certain limitations upon the rights of territorial sovereignty, such as the servitude not to build either fortresses or military establishments imposed upon one state for the advantage of another state. Thus, under article 29 of the Treaty of Berlin of 1878, there was imposed on Montenegro a subjection to the exercise of maritime and sanitary police on the part of Austria at Antivari as well as on the coasts of the Adriatic Sea.

[The United States supported its principal contention under Question 1 of the North Atlantic Coast Fisheries Arbitration compromise with Great Britain, 1910, on the assertion that the treaties of 1783 and 1818 established an international servitude in favor of the United States, exempting American fishermen from obedience to British fishing regulations, a contention which was not sustained by the Tribunal. See the Proceedings, Senate Doc. 870, 61st Cong. 3d. Sess., v. 1, 9, 11; and the valuable compilation of extracts from the writings of leading authorities, particularly Clauss, prepared by Dr. James Brown Scott in connection with the arbitration (Washington, G. P. O., 1910) —Transl.]

**1101.** A servitude must be regarded as a permanent relation with respect to realty, that is, a territorial right supported by the servient state for the advantage of the dominant state. As long as the title which established it subsists it passes with the legal possession of the territory to which it is attached, so far as concerns both the dominant and the servient state. A servitude, like every other exceptional right imposed as a limitation upon sovereign rights, must be interpreted restrictively and least prejudicially to the territorial rights which, by "common" law, belong to the servient state.

**1102.** The servitude may become extinct:

(a) By a convention to the contrary or by a denunciation of the treaty which created it;

(b) Through the consolidation of the two territories, servient and dominant, under one sovereign;

(c) By express or tacit renunciation on the part of the dominant state.

## TITLE IV

### PROPERTY OF THE STATE AND TAXATION

#### GENERAL PRINCIPLES

**1103.** Every state has the exclusive enjoyment of the property which, according to constitutional and municipal law, constitutes what may be called the fiscal patrimony of the state, and of all the funds and securities intended to constitute the public Treasury.

The sovereignty of the state, in order to provide for the administration of its finances, concentrates in its hands an ensemble of funds and securities which is constituted in part by the sums levied upon individuals under the form of obligatory contributions or taxes, in part by certain lucrative rights and privileges which the state exercises under the form of profitable public services, viz, railroads, posts, telegraphs, etc., or fiscal industries and monopolies. The state also derives funds from deductions made from the income of individuals under the form of progressive income taxes, inheritance taxes, etc. The sum total of all the sources of income designed to satisfy the needs of the state constitutes the public treasury and is the object of its fiscal administration.

**1104.** The sovereign power of each state should exercise its patrimonial and fiscal rights in order to meet the requirements of the public treasury in such manner as not to injure the general interests of the *Magna civitas*, and without violating the principles common to the life of all nations and peoples.

In principle, a state is unquestionably free to provide as it wishes the best method of enjoying its rights; nevertheless, as the exercise of the sovereign rights of the state must be brought into harmony with the general interests of the *Magna civitas*, so it must be with respect to the rights relating to the fiscal patrimony, contributions and taxes, which, under some form, are designed to satisfy the needs of the treasury. Even in these matters the independent autonomy of the state must submit to certain just limitations imposed by the necessities of the common life of the society of states.

**1105.** International law must establish general rules governing the exercise of the fiscal and property rights of every state, so as to bring them into harmony with the exigencies of the society of states. This should be the case with respect

(a) To the system of taxation and especially the customs system:

- (b) To the operation of railroads and railroad transportation;
- (c) To the postal and telegraph service;
- (d) To the means of communication.

#### TAXATION

**1106.** Taxes constitute a part of the property of the state. They consist in the ensemble of obligatory contributions which the state is authorized to levy upon individuals in order to provide for the necessities of the state.

**1107.** The right of resorting to taxation in order to meet the financial requirements of the state may be freely exercised by every government in conformity with its public law and cannot be considered as limited with respect to foreigners, except by virtue of provisions of treaties in force and by the rules of international law which limit the autonomy of every state in this respect.

It could not be considered in conformity with the principles of international law to submit aliens to a direct form of obligatory contribution, in exchange for their enjoyment of rights which have been called the international rights of mankind, mentioned in Title XXIII, Book I. Compare also rules 255 and 256. In modern legislation the various forms of exorbitant taxes imposed upon aliens and designated under the general name of *droit d'aubaine* have been abolished.

**1108.** It may be considered in harmony with the principles of international law, equity and justice to subject to the payment of taxes merely such aliens as are permanently established in the state, and not to expand, by other imposts, the system of taxation.

Aliens must be permitted to engage in trade and commerce, to acquire property, to sue and be sued, and to obtain the protection and security of their persons and property, without subjection to continual extortion. They must only bear certain special reasonable taxes, which may be considered as the equivalent for the local protection which is assured them and for the public service which they receive from the state.

#### CUSTOMS SYSTEM

**1109.** Every state may, through its customs system, freely regulate imports and exports in accordance with the principles which it deems most desirable for the promotion of trade and

commerce or protective restrictions. It may also, by means of treaties, reduce or modify its customs tariff in favor of one or more states.

**1110.** A state which, by treaty, grants favors to the citizens of one state but refuses them to citizens of another state or which, in the absence of treaties, applies the rule of reciprocity does not violate international law by thus establishing an inequality of treatment.

**1111.** States must recognize the reciprocal advantage of extending customs unions in order better to assure the development of trade and industry, to encourage the international diffusion of labor through free exchanges and to facilitate international competition and production.

Customs unions may be useful for states which have homogeneous interests and which find themselves in analagous conditions with respect to means of production, circulation, and exchange. One of the most important and prosperous customs unions was that between the states of Germany which commenced with the treaty concluded by the governments of Bavaria and Wurttemberg in 1827, under the name of the Bavarian League (for the history of the formation and development of the German Customs Union called *Zollverein*, see Calvo, *Droit international*, v. I, §§ 79, 80).

A project of an American *Zollverein* proposed by the United States at the international conference assembled at Washington in 1890 was not accepted by all the states; it met with a great deal of opposition especially on the part of the Argentine Republic (see Calvo, *op. cit.*, v. VI, *Supplément Général*, § 348).

Some authorities maintain the utility of an European customs union to counterbalance the competition of America with Europe and which Asia will soon offer. See in this connection Molinari's article in *Journal des Economistes*, 1888.

A very useful institution created in the interest of international commerce is that created on the initiative of Belgium, consisting in the establishment, through an international agreement, of a bureau located at Brussels for the publication of the customs tariffs of all the signatory states. At the conference held for that purpose March 15-21, 1888, there were represented twenty-five states. Following the conference of July 5, 1890, the convention for the creation of an international union was signed by thirty-four states and the international bureau established at Brussels April 2, 1891. It is operated under the supervision of the Minister for Foreign Affairs of Belgium.

**1112.** The customs system can have the character of a perfect customs union only between the signatory states. Hence, in order to constitute a perfect union, it will be necessary to abolish the customs boundaries between the contracting states, to institute a single customs frontier separating the union from the non-signatory states, to promulgate uniform legislation and a common customs

tariff and create a single customs administration. All these may be advantageously established by a treaty among states having common commercial interests.

#### CUSTOMS SYSTEM IMPOSED UPON A STATE

**1113.** No state may impose a customs system upon a weaker state by compelling it to sign a treaty framed for its exclusive advantage.

**1114.** A state which, through the favorable issue of a war, would compel a weaker state, powerless to sustain competition, to adopt a customs system designed for its exclusive advantage, would be guilty of a culpable abuse of power, which would justify the moral support of the other governments in favor of the weaker state in order to prevent such a disastrous situation. If the ruinous consequences to the defeated state were evident, they might justify the collective interference or interposition of the other states in order to prevent and end such an abnormal condition.

Compare rules 557 and 559.

#### INTERNATIONAL RAILROADS

**1115.** States situated in the same section of a continent must assign to railroad lines connecting contiguous states the character of international railroads. They must be deemed jointly and severally bound to assure their regular operation, conceding to every one the right to use them freely for commerce and intercourse.

**1116.** International railroads must be regarded as intended to promote the moral and economic development of civilized peoples and, while safeguarding the rights of territorial sovereignty, must be placed under the protection of international law in so far as concerns their peaceful use, the safety and regularity of operation, the facility and economy of transportation and the guaranty of private rights.

**1117.** States in the same section of a continent crossed by connecting railroads must agree upon the adoption of international regulations, subjecting to common rules the operation of and transportation on these international railroads.

## INTERNATIONAL RAILROAD REGULATIONS

**1118.** International railroad regulations must provide for the transportation of passengers and merchandise, for the uniformity of tariffs and rates, for the responsibility of the railroad management in all cases of delays, damages, losses or analogous matters, for the construction of the necessary buildings on the frontier zones of contiguous states, so as to facilitate the service and improve the traffic, and for the apportionment of the expenses incurred in these operations, without any discrimination between nationals of the states crossed and foreigners.

**1119.** The international railroad regulations adopted by states through a treaty must be regarded as obligatory even upon private companies which have constructed lines at their own expense or which have a monopoly of operation. Every state is bound to compel these companies to observe the regulations, subject to its responsibility for all the consequences of their non-observance by the companies, if it failed to adopt effective means to compel them to comply with and fulfill the obligations assumed by the state under the terms of the international convention.

**1120.** The international railroad regulations must be deemed, so far as their execution is concerned, under the legal protection of the states connected by the railroad and signatory to the treaty, and any question which might arise among these states with reference to the execution of the treaty should be referred to an arbitral tribunal.

A convention for the transportation of freight by railroad was concluded at Berne, October 4, 1890, between Germany, Austria-Hungary, Belgium, France, Italy, the Netherlands, Russia and Switzerland by which "common" legal rules were established among the signatory states, regulating the contract of international railroad transportation and also determining the responsibility of the management and the rules governing actions for damages. [A standard authority on the Berne convention and on international railroad transportation in general is the late Georg Eger, who wrote numerous works on the subject—Transl.]

## TRANSPORTATION OF FREIGHT BY INTERNATIONAL RAILROADS

**1121.** In the absence of a special treaty governing international railroad transportation the principles of "common" law relating

to the contract of transportation will be applied to the carriage of freight on an international railway, from the point of shipment to the point of destination or delivery of the goods.

**1122.** Actions at law against railroad managements, arising out of the contract of transportation, subject to the conditions required for their legal institution, may be brought against any one of the constituent roads of an international railroad which has participated in the international carriage of the freight.

**1123.** A railroad which has by bill of lading accepted freight for transportation is responsible for the fulfillment of the transportation on all connecting lines to the point of destination. Every successive connecting railroad, by the very fact of shipping the freight on the original bill of lading becomes a party to the contract of transportation and is obliged to execute it to the point of destination.

**1124.** The managements of the various railroads which have successively taken up the carriage of the goods confided to them on the original bill of lading, will be considered as parties to the original contract of transportation and bound to execute it in conformity with such bill, and will be held responsible for its execution.

**1125.** The right of legal recourse against railroad managements resides, by reason of the contract of international transportation, in the shipper or consignee of the goods, and may be brought either against the carrier who received the goods and issued the original bill of lading, or against each connecting carrier which successively participated in the international transportation, or against the carrier on whose line the loss or damage occurred, subject, however, to the right of subrogation, which is always reserved to the participating carrier. In either case the action can be brought only in a competent court in accordance with the rules of "common" law.

**1126.** A connecting carrier which has participated in a contract of international transportation is responsible for the loss, total or partial, or damage to merchandise from the station or point where it undertook the carriage to the point where it made delivery to the next connecting carrier. Each public carrier is relieved of its responsibility by proving that the damage resulted from the act of the claimant himself, either the shipper or the consignee, who had modified in transit the conditions of the bill of lading, or by proving that the damage arose through an inherent defect in the goods

(natural deterioration or spoiling), or from a natural fact (congealing or leakage of a liquid) or through an Act of God or *force majeure*.

1127. When the bill of lading mentions a place of destination which is not a railroad station the contract of international transportation must be considered as perfect and executed upon the arrival of the goods at the last station of the railroad. In so far as concerns the ultimate carriage of the goods to a consignee not located at the place of the last station of the railroad, it is proper to apply the railroad regulations in force at the place where the station is located in all matters relating to the delivery of the goods and the responsibility of the final carrier.

The above rules are based upon the principles of "common" law relating to railroad transportation. The contract must be considered as concluded by the mere fact of the acceptance of the goods at the point of shipment for their transportation to the place indicated in the bill of lading.

The station master at the point of shipment, who has certified the acceptance of the merchandise by delivering a duly signed and sealed bill of lading, indicating the date of acceptance of the goods, has thus undertaken the contract of transportation and the obligation of executing it for himself and for the connecting carriers, by ordinary means; consequently, the shipment must remain subject to the rules of "common" law which govern contractual relations. The same rule applies to the station master of successive lines who receives the merchandise with the bill of lading or way bill and duly receipts therefor. He thus establishes the acceptance of the goods and assumes the obligation to continue the transportation. He consequently participates in the execution of the contract, becoming responsible for any damage arising through non-execution or defective execution, upon the condition, of course, that the carrier which assumes the transportation, either the first carrier or a connecting carrier, and continues it, also assumes the position of a common carrier. Hence it must be admitted that the railroad is subject to all the obligations imposed upon a carrier of goods, and is responsible even for its employees and any other persons to whom it entrusts the obligation of executing the contract of transportation.

1128. The regulations of different individual carriers, denying or limiting their responsibility and obligations contrary to the principles of "common" law relating to the contract of transportation, cannot be regarded as valid so far as concerns the international railroad transportation. In the absence of positive rules established by treaty, the transportation must be governed by the principles of international "common" law and not by the regulations of the various carriers in derogation of those principles.

This rule rests upon the principle that international transportation has, by the nature of things, the true character of an international contract. The



question may arise according to the law of each country, whether railroad companies may, by their regulations, reject or limit their liability contrary to the principles established by the municipal law which governs in matters relating to railroad transportation. The legislation of certain governments excludes this possibility absolutely. This is the rule in Italy which, in the new Commercial Code, regulates by special articles the contract of railroad transportation and has fixed the responsibility of railroad carriers and removed every doubt upon the validity of railroad regulations by the following provisions of Article 416:

"Stipulations rejecting or limiting the obligations and responsibilities enumerated in articles 392, 393, 394, 400, 402, 404, 405, 407, 408, 411 and 415 are null and void, even if they are permissible under general or special regulations, save when the limitation of responsibility is accompanied by a reduction of the freight rate established in the ordinary tariffs, set forth in special tariffs."

Supposing that this provision is not incorporated into the legislation of a foreign country and that the local carrier has, by its regulations, denied its "common" law responsibility for the execution of the contract of transportation; in our opinion the regulation would not be valid to limit its responsibility for the international transportation. In fact, since the contract, by its very object and nature, has the inherent character of an international contract, the question of the responsibility of the carrier who has undertaken to execute the contract, must be resolved according to the principles of international "common" law, and not according to the regulations which, at the utmost, may be applied to contracts made and executed wholly within the territory of the state. To remove every uncertainty it is eminently desirable that the states establish a uniform law in the matter of international transportation. Nevertheless, we repeat that in the absence of any international convention, justice requires that difficulties and controversies be settled according to the principles of "common" law.

#### INTERNATIONAL TELEGRAPH LINES

**1129.** It is incumbent on every state to consider telegraph lines which connect contiguous states as intended to maintain relations of international intercourse and commerce, and a state must exercise its own rights over them in such manner as not to impair the general interests.

The peaceful use of international telegraph lines must be under the protection of international law.

**1130.** Save for the right of every state to defend its rights of sovereignty over telegraph lines within its territory, to protect its interests and to prevent the lines from being employed in a manner prejudicial to public security and order, no state may so exercise its own rights as to violate the right of all persons, without distinction, to use international lines for telegraphic communication.

**1131.** It is incumbent upon all states to enact uniform legislation governing the use of telegraph lines. On its part, every state must bring its municipal laws into harmony with the rules adopted in common accord, and will be responsible for its failure to do so.

**1132.** The regulations for the operation of international telegraph lines must fix the tariffs, the supervision, the priority of official dispatches, establish and keep the lines in repair and prescribe the proper measures to prevent their destruction or deterioration.

In the absence of such regulations the rules of "common" law and those stipulated in treaties must be observed.

International telegraph service was regulated by the treaty concluded at St. Petersburg July 10/22, 1875, under which a union was formed by numerous states. See the regulations of July 22, 1896, and July 10, 1903.

#### OPERATION OF INTERNATIONAL TELEGRAPH LINES

**1133.** No telegraph lines may be established or extended in or over the territory of a state without the previous consent of the state. Except for the right to lay submarine cables in the high seas, therefore, it is unlawful to prolong the lines and extend them into the territorial waters of a state without the consent of the state.

**1134.** The right of every state to grant or to deny authorization to prolong a telegraph line is inherent in its right of autonomy and independence, even when such extension is necessary to connect two international lines. Nevertheless, the unjustified refusal of a state to permit the extension of lines might be deemed arbitrary and might justify indirect measures of constraint and reprisal, provided good offices have failed to obtain the desired authorization.

**1135.** When an international telegraph line is in actual operation, no government may suspend the use of that portion of the line on its territory without proper official notice.

**1136.** The right of a state to suspend the use of international telegraph lines on its territory for certain classes of messages or for all messages, by giving public notice, may in all cases be recognized only for dispatches originating in or destined for its territory, but cannot extend to dispatches in transit or those addressed in time of peace from one state to another state.

## VIOLATION OF DISPATCHES IN TRANSIT

1137. Every government should, by its criminal law, punish any interference with international dispatches in transit as it does those transmitted within the state.

1138. Every government must also take administrative measures, in the absence of criminal proceedings, to prevent any arbitrary or unlawful interference of private persons in the regular operation of international telegraph lines, and to provide that persons responsible for any unnecessary delay in the transmission of messages, resulting in damage, shall be held personally liable.

## SUBMARINE CABLES

1139. That portion of submarine cables which is outside the territorial waters of a state must be deemed under the protection of international law, so far as the establishment and preservation of cables are concerned.

1140. To cut or to injure a submarine cable, intentionally or through culpable neglect, the result of which may be partly, or completely, to interrupt telegraphic communication, is to be deemed a violation of international law, and should be punished when it bears the character of a criminal act, without prejudice to a civil action for damages.

1141. Every state must recognize that for the protection of the general interests, it is necessary to confer on the war vessels of all countries the right to repress and prevent the cutting or injury of submarine cables on the high seas and to arrest offending or suspected individuals, in order to bring them to trial before a competent court according to the general rules of criminal jurisdiction of offenses committed on the high seas.

1142. The states signatory to the convention for the protection of submarine cables, concluded at Paris, March 14, 1884, are bound to comply with its provisions, the observance of which must be considered under the collective guaranty of all the signatory or adhering powers.

The convention of March 14, 1884, was originally signed by the following states: Austria-Hungary, Argentine Republic, Belgium, Brazil, Colombia, Costa Rica, Denmark, France, Germany, Great Britain, Greece, Guatemala,

Italy, Netherlands, Persia, Peru, Portugal, Roumania, Russia, San Salvador, Santo Domingo, Spain, Sweden and Norway, Servia, Turkey, United States and Uruguay.

#### INTERNATIONAL POSTAL SERVICE

**1143.** Every state is bound to facilitate the development of postal communication and so to exercise its sovereign rights over this service as not to interfere with the free right of international correspondence, which must be protected and encouraged.

**1144.** No state, under its rights of territorial sovereignty, may be deemed authorized to interfere with postal intercourse or to violate the secrecy of correspondence, even upon a well founded ground of political or administrative interest. It may be admitted, however, that for very serious reasons connected with public security, a government may suspend the sending or delivery of newspapers, giving notice of such a measure through all possible means of publicity.

**1145.** The postal service between states, so far as concerns its free exercise and the observance of the two preceding rules, must be deemed under the protection of the civilized states of the world.

**1146.** The states which subscribed the Postal Union Convention of June 1, 1878, the additional act of March 21, 1885, and the subsequent regulations relating to that convention, and the other states which subsequently adhered thereto, must faithfully carry out their agreements, subject to reservations made by any state at the time of signature or adherence to the original treaty.

The international postal union has the true character of a universal union of all civilized states, which have agreed to regulate the important public service of international correspondence in the best and most economical manner. Besides the ordinary postal service the agreement referred to the exchange of registered letters with a declared value, postal orders and parcel post, and to the service of collecting letters and bills of exchange (see the treaty of March 21, 1885).

#### TELEPHONES

**1147.** International correspondence by telephone and public operation of the telephone service should be governed by analogy by the rules concerning telegraphic correspondence.

## MARITIME POSTAL SERVICE

1148. Correspondence maintained by means of mail steamers must be protected in conformity with international law by application of the rules governing navigation and the landing of mail steamers.

Compare rules 327 *et seq.*

## ROADS AND HIGHWAYS OF COMMUNICATION

1149. No state may, without violating international law, deny the inoffensive use of public roads to foreigners who desire to use them as a means of communication and transit for the carrying on of peaceful commerce.

Nevertheless, every state has the right to regulate the use of and transit on its public roads, so as to assure public order and the security and defense of the state.

1150. A state which, without grave reasons, refuses to facilitate communication with foreign countries, violates international law.

The object of this rule is to concede that well founded international requirements might be the basis of a sort of lawful servitude of transit, in the sense that an intermediate state could not, without committing an arbitrary act, interfere with the right of travelling freely over the world, by placing impediments in the way of the free development of international activity and by its refusal to permit the transit necessary for international commerce. Let us suppose that, for such purpose, it may be useful to build a tunnel, and that a state, without good reason, on the one hand, refuses to contribute its share to the work, and on the other hand, does not allow the other interested states to construct it at their own expense; its unjustified opposition ought to be regarded as arbitrary and ought to give rise to collective remonstrances and the use against it of indirect pacific means to compel it to withdraw its opposition.

## PEACEFUL USE OF ISTHUSES

1151. The right to the inoffensive use of channels of communication must include also the use of isthmuses, whether they constitute a part of the territory of a state or belong in common ownership to several states, and, saving the right to regulate such use by administrative and financial laws, the restriction of the use of isthmuses to citizens or rendering their use by foreigners onerous and difficult, must always be regarded as an arbitrary act.

## TITLE V

### PROPERTY BELONGING TO PRIVATE INDIVIDUALS

#### GENERAL PRINCIPLES

**1152.** Real and personal property in the state, although belonging to private foreigners, must be subject to the authority of the territorial sovereign who has eminent domain over all the territory of the state and over things which must be regarded as constituting part of the territory.

Compare rules 246 *et seq.*, 291 *et seq.*

**1153.** International law must determine the just conditions to which foreigners must be subjected in the exercise and enjoyment of their rights within a state, so as to co-ordinate the free enjoyment of those rights with the interests of the territorial state and of its inhabitants.

**1154.** All the laws of the state relating to things, considered by themselves and independently of the persons to whom they belong, must have an absolute authority *ergo omnes*. The same rule applies to the laws governing the exercise of rights over movable and immovable property designed to safeguard the *id quod ad universitatis utilitatem spectat*, and which constitute the social and public law of the state.

**1155.** The laws which govern the rights of private persons over property, with a view to regulating the *id quod ad singulorum utilitatem spectat* must, in principle, exercise their authority only upon persons over whom the legislature has authority.

**1156.** No state may, without violating the principles of "common" law, subject to its laws all the personal rights of foreigners over movable and immovable property in its territory nor determine the extent of such rights. On the contrary, the state must recognize, in principle, the authority of foreign laws which, according to the principles of "common" law, are designed to determine and govern a foreigner's rights over property wherever it may be,

on condition that their exercise and enjoyment by the owner shall not involve a breach of the municipal public law or public policy governing property.

**1157.** Legislative jurisdiction to determine personal rights over property derived from family relations, succession or any other title, cannot be attributed to the sovereignty of the state in which the property is located, but must be established according to the rules of private international law.

Exclusive legislative jurisdiction of the territorial sovereign must be recognized only in the cases which come within rule 1153.

The rules proposed are based upon the principles which we enunciated in our younger days, in the first volume of the science which for 43 years has been the object of our study. This is, in effect, what we wrote in 1865, in chapter VIII, p. 133, of our *Nuovo Diritto internazionale pubblico*:

"We cannot speak of the public law of a state in the same light as we have spoken of its private law. The public law has as its object the maintenance of the social organization, and to that end the persons and things within the national territory must be subject to the principles of the public law of the territorial state. The right of every state to regulate the private life of its subjects may be exercised in foreign countries so long as the use thereof is inoffensive, that is to say, so long as it is not derogatory to the principles of public law of the foreign state.

"It follows from what we have just said, that the status and capacity of persons, wherever their rights may be exercised, the legal status of the family, the rights and duties of the individuals who compose it and the effects of such rights and duties upon the property of the family and its members in different parts of the world, the obligations arising out of contracts relating to property and other analogous matters, must be governed by the national law, and the citizen in his legal and international relations may rightfully invoke in the territory of every state the application of the law which governs his status and that of his family, even in relation to property wherever situated, as well as the law which has first governed the agreements and relations entered into by him, provided that the application of the law in the territory of a foreign state is not prejudicial to its political and economic interests, nor contrary to the principles which the legislature has fixed as laws of public policy.

See the French translation by Pradier-Fodéré, Paris, 1868, v. I, pp. 297, 298.

We have set forth these principles at some length in our *Diritto internazionale privato*, Florence, 1869, and at greater length in the 4th edition, Turin and Paris, 1902. Most present day writers have developed the same theory, especially Laurent in his important work *Droit civil international*, published in 1880.

**1158.** Civilized states should establish by treaty uniform rules concerning the legislative jurisdiction of the territorial state and of the foreign state in regard to the exercise and enjoyment of rights over property situated within their respective territories, in order to determine the authority of the territorial law or of the

foreign law which must govern all relations with respect to property. This would avoid the conflict of laws.

Considering that, in principle, a state cannot claim the right of subjecting to its laws all legal relations concerning property in its territory, and that it is only entitled to this right when it involves safeguarding the political and economic interests of the state and its inhabitants it can readily be seen that unless the legal limits of the legislative jurisdiction of the territorial sovereignty are fixed conflicts involving the legislative jurisdiction of each state, which only a treaty on the subject can avoid, are inevitable.

#### REASONABLE RULES CONCERNING THE LEGISLATIVE JURISDICTION OF STATES

1159. In the absence of a treaty on the subject, the legislature of each state may establish rules binding on the courts of the country. Failing such rules the courts must, in determining the law applicable, rely upon the general principles of private international law as in all cases where there exists no rule of positive law.

Undoubtedly the legislature of each state has not the power to proclaim rules of private international law. Nevertheless, it may furnish the courts with rules to determine which laws are to be applied in deciding cases submitted to them. Such rules, which are not obligatory upon foreign courts, are binding upon the judges of the territorial state.

The Italian legislature has thus sanctioned in articles 7, 8, 9, 10 and 12 of the general provisions of the Civil Code, the rules regarding the authority of the Italian law when in conflict with the law of other states. The German legislature has done the same in the introductory law to the Civil Code of August 7th, 1896.

The rules provided for by each legislature are binding upon the judges of the territorial state, and their violation or misapplication may give rise to an appeal to the higher courts, as in the case of the violation of a territorial law. Compare Fiore: *Delle disposizioni generali sulla pubblicazione, applicazioni e interpretazione delle leggi*, Naples, Marghieri, 2d ed., v. 2, p. 640, no. 449, and *Trattato di diritto internazionale privato*, 4th ed., *Leggi civili*, v. I, p. 265, No. 273. See also, Demangeat, Introduction to *Journal du droit international privé*, v. I, 1874.

1160. Legislative jurisdiction as regards personal rights over property should be ascribed to the state which, as against others, has the power to regulate the title upon which the owner bases his right.

1161. Legislative jurisdiction concerning property situated in the territory of the state, considered objectively, must be ascribed exclusively to the territorial sovereignty.



This sovereignty has not only the power to determine the legal status of property, but has also the power to fix the conditions necessary for the validity of rights *in rem* and to determine the legal recourse which the owner may have as to his own property or that of others situated within the national territory.

Compare rules 291 *et seq.*

1162. No right belonging to one person as against other persons with respect to property in a given state (*jus ad rem*) may legally subsist and be effectively exercised as a real right (*jus in re*) with power of bringing a real action (*actio*) except in conformity with the territorial law, which has exclusive jurisdiction of the matter.

The *actio*, as a form of legal protection of a real right (*jus in re*) implies the power to act directly upon the property, in whosoever hands it may be, and to make use of the coercive means allowed by the law to claim, maintain and defend one's right and to reject any demand on the part of others. It is clear that all this must be regulated by the territorial law of the state having dominion, jurisdiction and the power of authorizing and sanctioning the use of coercive measures. Any form whatever of interference in such matters on the part of a foreign sovereignty would be inconsistent with the autonomy and independence of a state. The principle *extra territorium jus dicendi impune non patetur* may be appropriately invoked.

Compare rule 293.

1163. Legislative jurisdiction must be recognized on the part of the territorial sovereignty in the following respects:

(a) To exclude every real relation between persons and things on the national territory, if that relation cannot subsist without prejudice to the territorial public law or the rules of public policy.

(b) To determine the principal conditions essential in order that the right over the property may be considered legally valid and effective;

(c) To fix the forms of public notice or record absolutely essential in order that the right over the property may be deemed valid as regards third parties;

(d) To limit the exercise and enjoyment of rights over property with a view to safeguarding the public interest and the organization of landed property and to assure the protection of the rights of property;

(e) To regulate the effects of possession and the legal consequences arising from a state of facts and relations established between persons and property within the national territory.

We cannot here develop the principles which serve as the basis for this rule. This has been done in our other works. See: Fiore, *Diritto internazionale privato*, and paper read before the Royal Academy of Naples *Sulla limitazione dell' autorità delle leggi straniere; determinazione delle leggi di ordine pubblico*, Atti, v. XXXVIII.

We will explain our views by means of examples:

- (a) The territorial law may prohibit trusts, irredeemable rents, or mortmain;
- (b) The territorial law may absolutely require written consent for the sale of real property;
- (c) The territorial law may require the registration or recording in a registration office of all transfers of property or a specification of mortgages, in order to give them effect with respect to third parties;
- (d) The territorial law may prohibit the leasing of immovables for more than thirty years, sub-emphyteusis, or joint ownership beyond a certain period of years;
- (e) The territorial law may govern possessory actions; forbid spoliation; regulate the effects of possession upon third parties, admitting that possession in good faith is equivalent to title with respect to third parties; or may fix the rules of acquisitive prescription.

**1164.** Legislative jurisdiction concerning rights over property which constitutes a decedent's estate, whether personal or real (limiting such jurisdiction, however, to the order of succession or the measure of distribution) must be ascribed to the state having authority to regulate family relationship and the rights of its members, subject, however, to the power of every territorial sovereignty to establish by its own laws the necessary measures to render the succession effective and to determine the cases in which the effective scope of this right of succession must be limited.

The principle inspiring this rule is sanctioned by Italy in article 8 of the general provisions of the Civil Code, which recognizes the authority of the national law of the deceased to regulate the order of inheritance and the measure of distribution, whatever the nature of the property and wherever situated. The Italian legislature has thus regulated the right of succession considered as a personal right over the patrimony of the deceased; but the legislature could not and did not intend to grant a real right over the immovables of the deceased. On the contrary, in this matter, the legislature has sanctioned the prevailing authority of the territorial law, by providing, in a general way in article 7, that "immovables are governed by the laws of the place where they are located." See Fiore, *Diritto internazionale privato*, v. III, Book V, Chapters II, V, VI, and the article published in *Giurisprudenza italiana*, v. LIII, on article 8 of the general provisions of the Italian Code, Turin, 1901.

#### INVIOABILITY OF PRIVATE PROPERTY

**1165.** Every state is bound to recognize that the property of private persons, whether citizens or foreigners, is inviolate. No

state may deprive a foreigner of his property or compel him to part with it against his will, nor subject him to vexatious measures as a condition of the enjoyment of his rights over his property.

The foreigner may be compelled to yield a part or the whole of his property for the public use but he may require the payment of a just and fair price, to be determined in accordance with the territorial law, under the same conditions as govern citizens.

**1166.** It is the duty of every state to determine the property which may be possessed or owned, establish the legal means of acquiring and disposing of property, and assure the exercise and enjoyment of all the rights of the owner, placing the foreigner in the same position as the citizen with respect to the local law and regulations.

**1167.** The right to dispose of property at death either by will or in accordance with the laws of intestacy, and the right to require that the intrinsic validity of the testamentary provisions and the order and measure of rights by succession under intestacy may be regulated by the law governing the status and capacity of the deceased and his personal and family relationships, if not inconsistent with the above mentioned rules, must be regarded as included within the rights of ownership over property.

**1168.** Possession of property acquired according to the conditions fixed by territorial law and having the character required by that law, should produce all the legal consequences ascribed to it, whether the possessor be a citizen or a foreigner.

**1169.** It is incumbent upon every civilized state to protect the possessor, even if a foreigner, and to grant him the faculty of availing himself of all the legal means authorized by the *lex loci*, to remove obstacles to his possession and enjoyment of the property and to recover such possession if deprived thereof.

**1170.** Legal acts or conditions accomplished or arising in conformity with the territorial law, from which rights of property may be derived, produce the same legal effects, whether brought by an alien or with respect to property owned by him. (For example, accession, confusion, specification, compensation for betterment of the thing, etc.)

Compare Fiore, *Diritto internazionale privato*, 4th ed., v. II, Book III, *Dei diritti che hanno per oggetto le cose*.

**1171.** Rights acquired by third parties over real or personal

property by virtue of the *lex rei sitæ* must be governed by that law, even with regard to the property of foreigners, and although their personal rights over their property within the territory are governed by the foreign law.

The basis of this rule is presented in the principles formulated in rules 1162 and 1163.

**1172.** The state must recognize and protect the rights of ownership of foreigners whatever the nature of the property in question may be.

Rules established must consequently be considered as applicable to private property, whatever its form, whether real or personal corporeal property, capable of possession or appropriation, or incorporeal rights, the products of the intellect or industrial invention, such as trade-marks and commercial and trade names, bonds, stocks, temporary or perpetual rents supported by the state and any other form of property having a pecuniary value.

#### LITERARY PROPERTY

**1173.** The right of an author to works of the intellect, books, discoveries, inventions, intellectual productions of all kinds, must be protected in the same manner as property in corporeal or incorporeal things.

**1174.** It is the duty of the state to determine by law which works of the intellect may be worthy of protection, the conditions under which legal protection may be granted and how it may be assured and limited. Every state must assimilate aliens to nationals in the enjoyment and exercise of the rights of authors to the products of their intellects and the institution of actions at law against those who violate their rights.

**1175.** It is the duty of states to establish through international convention uniform laws for the legal protection of intellectual property and provide the necessary sanction for the apprehension and punishment of infringements of copyright, maintaining the right of each of them by its own legislation to enforce the performance of the treaty.

The principles which may serve as the basis of an international convention on this subject may be determined differently according to the greater or less protection which it is desired to afford to authors in proportion to the work

they have done and the reward to which they are entitled for the services rendered to society. Thus, it may be admitted that the author may be allowed to reserve the right of authorizing translations of his work; that the duration of his rights be extended or restricted; that the causes for forfeiture be determined in a liberal or restrictive manner, etc. All these matters may constitute the object of special laws which may be fixed by treaty and do not come within the general rules we have endeavored to set forth.

A body of special rules on the subject has already been formulated in the treaty for the protection of literary and artistic property concluded at Berne, between Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland and Tunis, September 9, 1886. See further: Fiore, *Diritto internazionale privato*, 4th ed., v. II, Chap. IX, Turin, 1902, and the French translation of Charles Antoine, Paris, Pedone-Lauriel.

#### WORKS WORTHY OF PROTECTION

1176. Every state must consider as worthy of legal protection all scientific, literary and artistic works, i. e., books, dramatic and musical compositions, designs, paintings, sculptures, scientific models, drawings and any other work which may be considered a product of the mind, taste, wit and intelligence of its author.

#### RULES CONCERNING THE EFFECTS OF COPYRIGHT

1177. Copyright acquired by the author of an intellectual work in the country of original publication may secure legal protection in other countries only upon complying with the formalities of the territorial law.

1178. In every state the territorial law is applied to determine whether the right to protection has been acquired or lost, and to determine questions of piracy and infringement of copyright.

1179. Copyright originally acquired in a certain state cannot be deemed valid in a foreign country by the territorial law of which state such right is not recognized.

#### COMMERCIAL AND TRADE NAMES

1180. The commercial name, that is, the name which identifies each person or commercial firm must be regarded everywhere as a part of the property of the person or association entitled to be so designated and should be protected everywhere as is the physical person or entity itself.

**1181.** Usurping the name of another person must be considered as a violation of his rights and when done in bad faith and tortiously it must be punished as a criminal offense, whether the person injured be a citizen or an alien.

**1182.** It is a violation of international law for a state to permit, by reason of the absence of an international treaty, the usurpation of the commercial name of a foreigner or foreign association to go unpunished, when such usurpation assumes a tortious character.

**1183.** Every state must sanction by law the rules determining when the usurpation of a commercial name assumes the character of an offense and gives rise to judicial action. These provisions of the law must be considered as applying to all interested parties, without distinction between citizens and aliens, and without subordinating their application to the principle of reciprocity.

See for the further development of this rule and of the principles mentioned our work on private international law and the judicial decisions there cited.

**1184.** The name of a person or commercial association cannot lose its character as such when it is part of a trade-mark or is connected with commercial emblems or other signs. It cannot be considered as subject to the rules concerning trade-marks, however, unless the owner has assigned to it the character of a trade-mark by registering it as such.

#### TRADE-MARKS

**1185.** Any sign may be considered as a trade-mark which serves to distinguish products of a manufacturer or a certain line of business and of which the manufacturer or merchant has acquired the exclusive use in the country of origin by formally recording it under the provisions of law.

**1186.** The right of every merchant and manufacturer to individualize the products of his trade or industry by certain distinctive signs or marks and to prevent the unfair use by others of the same sign to deceive consumers must be regarded as one of the rights which should be protected under international law independently of treaties and reciprocity.

**1187.** Every state may fix by law the conditions under which a person may claim the exclusive use of a trade-mark or under which the right may be preserved or lost, but a discrimination between

citizens and aliens or a toleration of fraud or unfair competition must be regarded as contrary to international law.

1188. Whenever the ownership of a trade-mark or the legal title to its use is contested the *prima facie* owner, merchant or manufacturer must prove his exclusive right to use the trade-mark in the country where the suit is brought and that the right has not been lost by virtue of its laws and regulations.

1189. The ownership of a trade-mark, lawfully acquired in the country of origin should be regarded as acquired in all other countries where the trade-mark shall have been duly registered. The alien who has thus acquired the right to the exclusive use of a trade-mark must be permitted to assert his rights and obtain protection for the trade-mark thus registered. He may invoke the application of the criminal laws to prevent usurpation, or counterfeiting or unlawful use thereof.

1190. The penalties against the usurpation of a registered trade-mark should be applied without distinction against citizen and alien and a criminal action must be instituted on request of the public prosecutor or interested parties, in accordance with the municipal laws of each state.

#### NECESSITY OF A CONVENTIONAL "COMMON" LAW

1191. States which have by common agreement established rules for the acquisition of ownership in trade-marks and for their legal protection must bring their territorial legislation into harmony with the principles of conventional law.

#### PATENTS FOR INVENTIONS

1192. A state may grant to an inventor and his assigns the exclusive privilege of working his invention by conferring this exceptional right upon him by means of a patent. It may also determine by law the conditions under which such privilege may subsist, as well as its duration, extent and protection.

1193. The patent is also to be considered as a privileged concession granted by the state to an inventor. It can never give to the inventor the right to demand respect for his invention in other countries, as in the case of property rights.

## INTERNATIONAL PROTECTION OF PATENTS

1194. The international protection of patents for inventions can be secured only by means of an agreement between the states and can be effective only in those states which by treaty *ad hoc* have established the rules, conditions and formalities necessary to secure in their respective territories the legal protection of patents granted by each of them.

1195. In the absence of such an agreement every state may apply within its own territory its own municipal law in determining whether or not a patent shall be granted, and when and how infringements and the sale of the patented articles may be prevented and punished.

1196. When the legal protection of patents is assured between two or more states by means of a treaty the privilege acquired in one of the contracting states cannot be regarded as valid in the other states unless the patent has been legally secured in the country of origin and no cause of forfeiture has arisen, and unless the protected inventor shall have complied with all of the formalities required by the municipal law of each state to enjoy within its territory the privilege of the patent and the preservation of his rights.

1197. An inventor who may in a given state demand protection for a patent taken out in a foreign country cannot be expropriated of his right for the public use without just compensation.

## MERCHANT SHIPS

1198. A ship can have only one nationality and it cannot acquire another unless it establishes by means of a document furnished by the competent maritime authorities of the country of origin that it has completely renounced or lost the right to fly its flag.

1199. Every ship must be presumed to have retained its nationality of origin so long as it does not establish the legitimate acquisition of another nationality, or has not been deprived of its national character, either by the provisions of its national law or by the operation of the rules of customary international law.

According to the legislation of certain states a ship may lose its national character. This is the case under the Italian law if an Italian merchant vessel,



for any reason, becomes the property of a foreigner. This may also be the case, according to the principles of international law, when a merchant vessel captured in time of war, after its adjudication to the captor in a prize court, loses its nationality of origin.

**1200.** Each state has the right to fix the conditions which merchant vessels must fulfill in order to obtain national registry and the right of flying the national flag, and to determine when the original nationality is lost.

#### PROOF OF THE NATIONALITY OF A VESSEL

**1201.** Every vessel is bound to prove its nationality and may demand that the certificate, in proper form and duly authenticated and endorsed, obtained from the state to which it claims to belong, shall be considered as conclusive evidence and decisive of the question. Such certificate must be regarded as *prima facie* sufficient to establish and prove its nationality in the absence of proof of fraud or arbitrary use.

**1202.** The certificate of nationality must mention the name of the vessel, its dimensions, its tonnage and the means of identifying it, the name or names of its owner or owners, specifying the share of each, the maritime district in which it is registered, its changes of ownership, all liens and mortgages or maritime pledges existing against it, and everything that it is necessary *prima facie* to know in order to establish its legal status with respect to those having rights or claims against the vessel.

The legislation of the various states is not uniform in this matter. According to the English act of 1854 (Merchant Shipping Act) mortgages need not be described in the certificate of nationality, but only registered in the district where the ship is registered. The certificate of nationality, however, states that it does not constitute a title or document to establish mortgages. The purpose of our rule is to establish that the papers on board should suffice to make known the legal status of the vessel with respect to its owners and their assigns and to give notice to third parties.

**1203.** It should be deemed a matter of common interest for all states to agree upon establishing a uniform law in the matter of preserving and changing the national character of merchant vessels and to subject the grant and use of the certificate of nationality to such conditions as may be required to safeguard the carrying of passengers and the security of navigation.

The conditions required for the granting of the certificate of nationality must on principle be considered as within the domain of the municipal law of

each state. Nevertheless, the conditions surrounding the construction of ships with respect to the guaranty of capacity required of ship builders as well as those concerning inspection as evidence of seaworthiness must always be regarded as of international concern.

#### RIGHTS OF A MERCHANT VESSEL

**1204.** Any merchant vessel which has lawfully acquired the right to fly the flag of a nation and obtained, in conformity with its laws, a certificate of nationality has the right everywhere of invoking the application of its national laws in all questions relating to its legal status as an object of property.

**1205.** The law of the national state of a vessel must likewise be applied to determine the total or partial transfer of ownership, the nature and order of precedence of rights acquired by creditors in conformity with the law of the maritime district in which it is registered, and the obligations and responsibility of its owners, provided, however, that the latter be not inconsistent with the principles of public law or public policy in force in the state where its application is invoked, or with the rules of international law.

#### MORTGAGES AND REAL RIGHTS IN A VESSEL

**1206.** The national law of a vessel must determine whether it may constitute the object of a mortgage or lien. By that law, also, the formalities required for the valid acquisition of those rights must be regulated, to determine their extent, their effect and conditions of validity and their duration and extinction.

**1207.** A mortgage on a foreign vessel, properly registered according to its national law, must be recognized in other countries, even in those whose laws have not recognized maritimes mortgages, and the mortgage creditors may, in conformity with the foreign law, claim their right to resort to foreclosure proceedings wherever the vessel may be found. No obstacle can be found in the diversity of the local law relating to foreclosure.

**1208.** The rights acquired by creditors upon a vessel in a certain place must be governed by the law of that place. This law must always recognize real rights acquired in the vessel by third parties in conformity with its national law before its entering territorial waters, provided that this recognition of vested

rights, attaching according to the national law of the vessel, as against those acquired by creditors under the local law, shall not involve any violation of local public law or public policy.

These rules seek to establish that the ownership of a vessel and its transfer, entire or partial, effected through a mortgage or lien which the owner has given as security for a debt, must be everywhere governed by the law of the state to which the vessel belongs, regarding as the permanent situs of the vessel the maritime district in which it has been registered and inscribed after its construction.

For further details see our *Diritto internazionale privato*, 3d ed., v. II, chap. VII, § 4, and the French translation of that work by Charles Antoine, Paris, Pedone-Lauriel.



**BOOK FOUR**

**THE ENUNCIATION OF INTERNATIONAL LAW AND  
ITS ENFORCEMENT**

## FUNDAMENTAL PRINCIPLES

**1209.** All states constituting a *de facto* society should provide for the legal organization of that society, especially with a view to preserving a state of peace and preventing the disturbances which inevitably result from war. To this end it is essential:

(a) To create (1) a supreme organ invested with the power of proclaiming the rules of "common" law and assuring their obligatory force; (2) an organ charged with the interpretation, development and application of the rules proclaimed in order to safeguard their observance; (3) a tribunal charged with adjudicating legal controversies arising between the states constituted as a society when by diplomacy and other means agreed upon no friendly arrangement shall have been reached;

(b) To provide for the punishment of violations of the "common" law, to re-establish the authority of that law and to re-affirm and strengthen respect for it by coercive measures admissible in time of peace;

(c) To proclaim the legal rules according to which, in extreme cases, the use of force may be legitimate, to punish arbitrary violations of the "common" law and to regulate the exercise of exceptional rights in time of war, with reference both to belligerent and neutral powers.

**1210.** The institutions designed to meet the requirements in paragraph (a) are the Congress, the Conference and Tribunals of Arbitration. The principal means for settling disputes and preventing litigation are resort to diplomatic negotiations, good offices, mediation and international commissions of inquiry.

The coercive measures admissible in time of peace to attain the purposes indicated in paragraph (b) are retorsion, reprisals, collective intervention and pacific blockade.

The laws and customs referred to in paragraph (c) constitute the law of war.

A large number of states established in different parts of the world have gradually constituted themselves into a *de facto* society and have in principle

recognized the authority of international law in regulating their relations among themselves. They have not, however, agreed to ascribe to the rules of international law the authority of "common" law and still less to insure its observance by legal methods. Therefore, up to the present time the organization of the international society of states has not had a legal basis. The tendency at present is to solve the problem by gradually eliminating the unorganized state of nature, the preponderance of force, the absence of a "common" law, and to give to international society a legal organization. It is proper to state that governments have already made a beginning in the right direction, for the two Hague Conferences of 1899 and 1907 constitute the most important event of our time.

Under these conditions of fact we have studied the solution of the problem on a broader plane, taking into account what has already been done and suggested as a solution of the problem, although we recognize that the measures we propose could not at present be brought to realization. In order to be productive, science must always consider not only the present, but the future as well. The present is history and the future must be a rational development of the historical fact. Otherwise progress cannot be conceded as possible of realization even in a more or less distant future, but would be merely fanciful thought, idealistic and utopian. Our proposals, though admitting that they may not all be practicable at the present time, have for their basis the historical fact which has been our constant guide, and appear to us to be a rational development of that fact. Time, moreover, has justified many of our views. Many propositions set forth in our *Nuovo diritto internazionale*, published in 1865, which appeared then purely idealistic, have become actual facts (see *supra*, Introduction.)

In order to provide international society with a true legal organization and to develop the sentiment of justice, it will be necessary gradually to eliminate the preponderance of politics and to admit that law must be the sovereign of the world. In order to attain that exalted end the existence of an international organ or agency is indispensable to elaborate and to proclaim the "common" law of civilized states constituted as a society and to insure its obligatory force. There is need also of another agency or organ to maintain the legal organization established and the observance of the law proclaimed. Finally, a third agency is required to apply the law and to settle according to justice the controversies that may arise between states.

The institutions that we propose, the Congress, the Conference and Tribunals of Arbitration, are designed to bring about the objects indicated. It will be well to take into account the rules already adopted, and those likely to be adopted, in order to determine the attributes and functions of each of these institutions so as to effect the best legal organization of international society.

This necessity of creating such a legal organization by means of organs designed to proclaim the "common" law and to assure its enforcement had already been recognized by eminent publicists, by whom different solutions have been proposed. Lorimer recommended the permanent establishment of three organs such as those existing in every state, namely, an international parliament, an Executive power and a judiciary. Bluntschli advocated also an international society organized as a state. Others were in favor of a confederation of states, with a central power endowed with the legislative function and coercive power of enforcement and having at its disposal the federal military force. Yet these publicists, by proposing to ascribe a preponderant vote to the great powers tended thereby to emphasize the predominance of politics

prevailing among those powers. (For critical observations see: Fiore, *Diritto internazionale pubblico*, 1865, chap. VI, of Part second, pp. 347 *et seq.*; *Trattato di diritto internazionale*, v. I, *Introduzione*, Chap. VI, pp. 94 *et seq.*; v. II, §§ 1498 *et seq.*, p. 489, 2d edition.)

We shall not mention the other systems proposed which, in general, constitute no improvement because they imply an absolute necessity of radically transforming international society, or sanctioning the superiority of the great powers, thus supporting necessarily the supremacy of politics over right.

It must be added, that the best conceived legal organization will never prevent the arbitrary and violent infringement of "common" law established among the states. Hence the necessity for coercive measures to enforce the observance of that law. Some of these measures may be resorted to without disturbing peace, but where they remain ineffectual war may become unavoidable. The idea of perpetual peace, cherished by philanthropists as the ultimate result of legal organization of international society does not seem to us to be possible of fulfillment.



## TITLE I

### THE CONGRESS

1211. The Congress must be deemed the principal organ of the international society constituted by all of the states entertaining *de facto* relations, which seek to organize a society by establishing in common accord and proclaiming the rules governing their reciprocal relations, by making provision to assure their observance, and by determining upon the method of procedure calculated to bring about the legal settlement of any international controversy which may arise between them.

In view of the fundamental idea that the states constituting a *de facto* society must be deemed equal and independent, whatever their actual physical power with respect to territory, population and financial and military strength, it follows that none of them may aspire to hegemony and still less assume to dictate its laws to others. As it is, nevertheless, indispensable to proclaim the "common" law of the international society, it must be admitted that those which constitute it should proclaim the law, provided they can agree upon it.

As the legal rules of the international society must have for their basis the reciprocal consent of its members, it follows that they cannot be dependent upon the arbitrary interests of politics. They must be the rational expression of the principles of justice as best adapted to the present conditions of that society, so as to protect the rights of its members and to safeguard their common interests. Nevertheless, the common consent of states is indispensable in order to secure recognition for the laws and to proclaim them, as well as to clothe them with binding force by punishing their violation. To attain this end an organ is required, endowed with sovereign power, which, in our opinion, should be the Congress. The Congress should, on principle, be constituted as mentioned hereafter, so as to safeguard the legal equality of the states forming the international society, as well as the personal rights of the legal entities which compose it.

In our opinion there exist, in substance, two great republics. The one has neither territorial limits, nor seas, rivers or mountain boundaries, and comprises the human population united among themselves by the bonds of civilization and their collective interests, constituting a *de facto* society or *Magna civitas*. The other republic is formed by those who, united by their social, civil and economic interests, constitute a state.

Neither of these republics can exist without a law which fixes the fundamental rules of the normal development of their activity and their reciprocal relations and actions. The observance of these rules must be admitted as indispensable to their harmonious co-existence. Each of these republics, therefore, is under the necessity of having a superior organ invested with the power of

proclaiming the organic law of the society. This superior organ in the greater republic of the *Magna Civitas* must be the Congress.

In effect, the reciprocal independence and legal equality of the states in the *de facto* society cannot be safeguarded otherwise than by requiring these states, assembled in a Congress, to recognize the rules most conformable to the principles of justice and the exigency of actual fact, and therefore best designed to regulate their common relations, and to proclaim those rules as obligatory upon its members. On the other hand, with respect to the other republic, namely, that constituted by each individual state, the people thus politically organized in each country constitute the superior power and invest it with the function of proclaiming the law and safeguarding the organization of the state. It is thus reasonable, so far as concerns the state, that the organ designated to proclaim the law should be the organ which the political constitution entrusts with such power.

#### FUNCTIONS OF THE CONGRESS

**1212.** It is the duty of the Congress:

(a) To draw up the legal rules which must govern the relations between the states constituted as a society, and to declare the rights which must be ascribed to the persons and legal entities constituting part of the *Magna civitas*;

(b) To amplify, modify and abrogate rules previously enunciated;

(c) To provide for the maintenance of legal order in the international society by insuring the observance of respect for the "common" law, and proclaiming the rules which must govern the use of coercive measures permitted in time of peace;

(d) To devise means best adapted to insure peace and to eliminate the causes of difference which might disturb it;

(e) To lay down rules relating to compulsory arbitration and to regulate the constitution of a permanent court of arbitration, invested with arbitral jurisdiction in cases where the parties must be considered as obligated to submit to arbitration;

(f) To inaugurate measures best adapted to prevent an impending war between states, members of the society, to bring them into operation and arrest the disastrous consequences of war after hostilities have begun;

(g) To regulate war by proclaiming the rules which ought to govern war and be applied in the conclusion of peace, so as to prevent the victor from taking undue advantage of his power to impose upon the vanquished unjust conditions, in violation of the rules of orderly co-existence in international society;

(h) To protect the natural rights of persons and legal entities belonging to the *Magna civitas*, with respect to nations and peoples not members of the society;

(i) To exercise supreme authority over the Conference by modifying or reversing its decisions, and over any state declining to comply with the decisions of the Conference or with the award pronounced by a tribunal of arbitration, by ordering the employment of coercive measures to assure the recognition and execution of such award;

(j) To lay down rules which shall govern and may justify collective intervention in the cases contemplated in rules 556 *et seq.* in order to repress, within a state, disorders involving a violation of "common" law;

(k) To fix the reasonable limit of armaments in time of peace, by determining the maximum contingent of army and navy of the states of the society, taking into account their special conditions, the requirements of internal and external security and the extent of their dominions, both continental and colonial.

The problem of the limitation of armaments is beginning to impress itself seriously upon the attention of all governments, and it is to be hoped that it will be finally adjusted, after a thorough examination, by future peace conferences. In the last Congress of 1907 it appeared in the Russian program, but it was eliminated owing to the opposition of several governments. The question, undoubtedly, is not yet ripe for settlement, but, as the burden of military expenditures becomes increasingly heavy, with a growing disposition among civilized peoples not to bear such a burden, the necessity of limiting armaments must be faced. The time will come when public opinion will succeed in imposing itself upon governments, which, in order to support their international policy and endeavor to maintain themselves in the first rank of states are prompted to burden the country with increasingly heavy charges. We are convinced that the heavier the military expenditures become the sooner will public opinion impose on governments a new course in their international policy, which will make possible the limitation of armaments.

Be this as it may, in the last Peace Conference of 1907 the following motion was unanimously adopted:

"The Second Peace Conference confirms the resolution adopted by the Conference of 1899 in regard to the limitation of military expenditure; and inasmuch as military expenditure has considerably increased in almost every country since that time, the Conference declares that it is eminently desirable that the Governments should resume the serious examination of this question."

**1213.** The decisions of the Congress must have the same obligatory authority and value as any positive agreement with respect to the states represented and actually members of the interna-

tional society and with respect to other states which may be constituted members of the society by adhering to it.

#### CONSTITUTION OF THE CONGRESS

1214. The Congress should be constituted:

(a) By representatives of the states constituting the society of states;

(b) By delegates elected by the people of the states;

(c) By delegates elected by the universities.

1215. The representatives of the states shall be two and are to be designated by the sovereign of each state, large and small states being equally represented.

The delegates of the people, two in number, shall be elected by single suffrage by those who, according to the municipal law of each country, have the right of voting for delegates to the Congress.

The scientific delegates to the number of ten in all shall be elected by a system of limited votes by all the universities of the states represented.

In order that the Assembly or Congress may have its own distinctive character, that of representation in the international society, it has seemed to us essential that it should be so constituted as to make such representation effective and complete. Accordingly, we believe that all states, small or great, weak or powerful, should be placed on the same footing of liberty and equality, otherwise strength would have a preponderating influence in the enunciation of the law which would govern the *Magna civitas*. Just as within the state the rights of man cannot be in proportion to his physical strength, so in the *Magna civitas* the rights of states ought not to depend upon their importance.

In view of the fact that the international society does not merely comprise the states which are subjects of international law, properly speaking, but also other forms of association which may lay claim to their own international rights independent of those of the state, and that international law must govern the rights and interests of all legal entities constituting the *Magna civitas*, we have considered it indispensable that the people be represented in the Congress.

In the desire to give such representation its true character, we have deemed it advisable that the delegates of the people to the Congress should be elected by the people and not by parliament. In a parliamentary government the majority represents the policy of the present government actually in power, and if parliament should appoint the delegates to the Congress it would serve merely to give added strength to the prevailing policy.

As to the method of election by the people, we do not believe that the system in use for political elections should be adopted. The electoral vote for representation in parliament may be more or less extended, but for representation in the Congress it is indispensable for an intelligent and enlightened vote that the electoral right be exclusively reserved to the intelligent classes.

We have proposed single suffrage for the electors called to choose the two delegates in order to secure representation of minorities. Absolute government by majority is not government of the people, but that of the majority over the minority. By single suffrage the two delegates having the greatest number of votes would be elected, and thus the representation of the popular majority and minority would be obtained.

Finally, in view of the fact that in elaborating the laws of the *Magna civitas*, reason and history must be laid under contribution, also taking into account present historical contingencies and popular convictions, and that scholars are qualified by reason of their gifts, to formulate the principles best adapted to govern the international society, we have deemed it advisable that science should also be represented in the Congress. We have proposed that the representatives of science be limited to ten, believing that, notwithstanding their unquestioned competency, their influence should not be preponderant, for scholars will not always take into account the actual conditions which must govern the drafting of positive law. They often follow the straight scientific course without taking account of the fact that positive law cannot be best represented by such course, but that, on the contrary, they must occasionally follow a modified line, more or less close to the straight course, and that positive law at any time can only be designed to obtain the best and to avoid the worst.

We have, furthermore, proposed that the delegates of science be designated by the scientific bodies represented by the universities, and we have suggested for their election a system of limited suffrage in order to assure among them also a representation of minorities. We fully realize that many people will consider our system as a philosophical conception and a mere Utopia. We do not hesitate in saying that we do not mean to claim for our proposal any early realization, but that it can only be achieved in the more or less remote future. It will be necessary, in the first place, for states to acquire a better idea of their reciprocal interests; for states to understand the necessity of giving the *Magna civitas* a more rational legal organization and finally to be able to impose upon their governments the task of thoroughly solving the problem. It will be the work of time, and, indeed, of a very long time. The organization of the people associated as states did not take place in a day. Evolution has experienced several cycles; the successive preponderance of the sacerdotal caste, and of privileged castes, autocracy, first of the monarchies of divine right and then of dynastic policy, and finally, parliamentary government.

The organization of international society can only come about through evolution. The initial movement must describe its parabola in successive cycles.

The two Hague Conferences represent one of the cycles truly characteristic of evolution. It is, indeed, a fact most worthy of consideration, that in 1899 and 1907 a great many states in various parts of the world met at The Hague in order to proclaim by common agreement the rules of their relations and to formulate their common law of nations in regard to many questions. The states represented in these two great assemblies had the true character of a Congress, in our sense of the term, 26 in 1899, and 44 in 1907, namely, Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, France, Germany, Great Britain, Greece, Guatemala, Haiti, Italy, Japan, Luxemburg, Mexico, Montenegro, Netherlands, Nicaragua, Norway, Panama, Paraguay, Persia, Peru, Portugal, Roumania, Russia, Salvador, Servia, Siam, Spain, Sweden, Switzerland, Turkey, United States, Uruguay and Venezuela.

One thing leads to another. The fact already achieved is that the legislative assembly of international society has been constituted and before adjournment of the second conference unanimously expressed the wish that a third conference or congress be held within a period of time equivalent to that between the first and second conferences, and that a committee be created to prepare the program and to collect the different propositions and to assemble the matters susceptible of international regulation. Under these conditions it may already be affirmed that the Congress or Legislative Assembly, as an institution suggested by us in our first edition of 1890, translated into French by Chrétien in 1893, is an accomplished fact, and that at present all that remains to be done is to perfect its organization, to set forth its objects with greater precision, and to better regulate its constitution.

1216. Besides sovereign and autonomous states, that is to say, those having the complete enjoyment and independent exercise of the rights of sovereignty, both internal and external, there should likewise be admitted to the Congress semi-sovereign states, namely, those in a relation of vassalage toward or dependence upon a suzerain state.

As on principle there is no doubt that semi-sovereign states, as well as sovereign states, belong to the *Magna civitas*, it follows that they should likewise be admitted to the deliberations of the Congress and to cast a vote in the promulgation of the legal rules which must protect the rights of all the legal entities constituting the international society.

Bulgaria, notwithstanding the fact that it was under the dependency of Turkey, was allowed to take part in the Hague Conference.

It would be best that representation in the Congress be as great as possible.

1217. The Pope, as sovereign head of the Catholic Church, may be admitted to the Congress, provided that he recognizes that he participates therein, not in the same capacity as any other political sovereign but as the spiritual sovereign of the Catholic Church.

In view of the rules posited to determine the legal status of the Roman Catholic Church, and the character of its international personality, it follows that, while the Church may not be assimilated to a state, it belongs, nevertheless, to the international society and may claim international rights. It has undoubtedly the right to be represented in the Congress in order to request the protection of its international rights as a subject of *Magna civitas*. To be sure, so long as the Church persists in its claims to temporal power, and shall desire to be assimilated to a state, it will be impossible, with such unjustified pretensions, to admit it to the deliberations of the Congress of states. To do so would be indirectly equivalent to assimilation and to confuse the two interests of state and church which, as previously shown, are and must remain, by reason of their character and purpose, completely separate. (Compare rules 74 to 76, and 729.)

1218. The members of the Congress, on their first meeting, shall appoint their President and other officers.

**1219.** The Congress shall initiate its labors by verifying the legality of the certificates of election or appointment of its members.

After this preliminary work, provision ought to be made for the discussion of questions which are to constitute the object of its deliberations, in accordance with a program in which the topics to be discussed will have been determined in their order of discussion.

The representatives of states and the delegates to the Congress shall retain their character as such until such time as the Congress to which they are delegated shall have ended its labors.

#### CONVOCATION AND DURATION OF THE CONGRESS

**1120.** The Congress may be convoked on the initiative of one of the member states of the society, which shall present in a diplomatic note the reasons why the meeting of a general Assembly is considered opportune, designating, as well, the country in which it shall meet. This note shall be addressed to all of the member states of the society and shall be sufficient to convoke the meeting of the Congress when it is supported by a third of the states which shall have taken part in the previous Congress.

**1221.** The Congress, constituted as a result of the convocation, shall remain in session until the completion of the labors for which it was convoked.

The Congress, in our view, is not a permanent body, nor do we claim any permanence of power for its members.

Undoubtedly the international society cannot remain at a standstill. Hence the laws adopted in common accord to govern it cannot remain immutable. As these laws must be adapted to historical and moral requirements and to the needs of such society, it is natural that when, owing to changes and the development of their respective interests, the laws in force become inadequate, it is necessary to modify them and to convoke for that purpose a new Congress. Hence, it must be deemed preferable to deny the permanence of the powers of the members of the Congress who are to enunciate new laws, because they will be better able to respond to the needs of progress and inevitable evolution.

**1222.** The conclusions of the Congress, adopted by majority, ought to have the same authority as any international agreement and the rules proclaimed by it ought to have the character of positive rules with respect to all the states of the international society, including those subsequently joining it, and none ought to disregard the binding force of such rules so long as they have not been amended by a new Congress.

In view of the fact that the rules and laws of the *Magna civitas* must be those which its representatives, that is to say, the Congress, have proclaimed as best adapted to govern the relations of all the legal entities constituting it, it is reasonable to assume that, once decided upon, a rule of international law must be binding upon all the member states, and that none of them should disregard the authority thereof by making reservations. At present, it is admitted that any one of the states assembled in a Congress may avoid the binding force of the rules adopted by the Congress by making reservations upon the principles adopted by the majority. This can be done because at present the principles which must govern the Congress and the authority of their conclusions are not yet definitely established. A state may or may not, as it chooses, come into a Conference and prefer a condition of complete isolation, but it does not seem admissible in our opinion that a state may be a member of the international society and yet disregard the authority of the laws which must govern it. This would in effect be admitting that the representative of an electoral district, by his reservation upon the binding force of a law enacted by the legislature, could save his district from the authority of a law adopted by the majority.

Bonfils is of the opinion that the minority cannot be compelled to submit to the vote of the majority, because thereby the independence of every state would be compromised and diminished. (*Droit international public*, § 806.) This cannot be denied under present conditions. But if our system could be adopted, if, in other words, the states were to recognize the Congress as the supreme agency through which rules governing their relations could be established, it would not be necessary to agree with Bonfils. Certainly, every state would be free to join or not to join the *union* or society of states. But it would be inadmissible that, although a member, such state could freely avoid the authority of a law adopted by the legislative power of the *union*, namely, the Congress, and that the other states of the *union* or society could not resort to any methods proper in time of peace to compel such recalcitrant state to recognize the binding force of the law adopted. If it were otherwise, the legal rules of the international society, framed by the states constituted as a *union* would be binding only upon those willing to recognize them. How, under such conditions, could the international society be given a true legal organization?

**1223.** The functions of each Congress must be regarded as concluded with the signature of the treaty in which are incorporated the rules adopted by its members, or with the signature of the final and general protocol, in which all the protocols previously subscribed are approved and confirmed.

#### PROCEDURE

**1224.** Every member whose credentials as a member of the Congress are approved shall be entitled to take part in and vote in all the deliberations of the Congress.

**1225.** Each member of the Congress shall be entitled to one vote.



The vote shall always be cast by name, according to the alphabetical order of the states represented. Any proposition shall be considered approved when voted for by a majority of the members present.

**1226.** Whoever shall have taken part in the discussion shall be bound to cast his vote and subscribe the resolution. In case the delegates of a state who have taken part in the discussion shall absent themselves from the meeting in which the vote is to be signed or shall refuse to sign it, they would be guilty of censurable conduct in neglect of the general duties incumbent upon all the states of the union represented in the Congress, and mention of the matter should be made in the proceedings of the Congress. The delegates of a state signing a resolution adopted by the majority, against which they have voted, shall be allowed to insert in the record of the proceedings their dissenting vote, indicating the reasons therefor.

**1227.** The proceedings of the Congress must be drawn up in writing and the discussions and resolutions of each meeting must be confirmed in a protocol to be signed by all the representatives, whether members of the majority or minority.

All the proceedings of the Congress should be officially published.

**1228.** When the Congress is called upon to examine and pass upon the resolutions adopted by a Conference it may not only require the exhibition of all the papers and documents submitted to the Conference, but may also require the production of other documents and papers which may be deemed necessary for its information.

#### SANCTION OF THE RESOLUTIONS OF THE CONGRESS

**1229.** The Congress shall insure the proper recognition of its resolutions by providing appropriate penalties to that end.

**1230.** When the Congress proclaims a new rule binding upon all the member states of the union or society, the power to declare any state which refuses to abide by the rule as excluded from the "union" must be deemed a sufficient sanction to assure respect for the rules adopted. Moreover, a state desiring to continue its *de facto* relations as a member of the union cannot be permitted to

disregard the imperative authority of any of the legal rules proclaimed by the Congress.

**1231.** When the Congress, in the general aim to assure peace and prevent war, has proclaimed a legal rule and adopted a resolution with a view to settle a difficulty pending between two or more states, these states may be compelled to comply with the resolution or decision by all lawful means proper in time of peace.

In view of the fact that the preservation of peace is of chief interest and that war gives rise to a very serious moral and economic disturbance, not only with regard to the belligerents, but also with regard to all the states constituting the *Magna civitas*, the Congress, as the supreme agency for the protection of the general interests, must possess the power to order the use of all peaceful means to obtain the observance of its resolutions and conclusions and prevent war.

**1232.** When the Congress shall have directed one or more of the states of the "union" or society to resort to lawful and peaceful means to compel the refractory state to observe a resolution or rule concerning it, the state or states intrusted with such a mandate will be invested as of right with all the powers granted by international law for the execution of the mandate. This ought to be the case when the Congress shall direct a state to exercise its good offices or mediation or shall appoint an international commission of inquiry.

**1233.** Should the Congress recognize that, under the principles of "common" law, it would be proper to impose arbitration upon the parties to a dispute, it could order arbitration and determine the rules for the constitution of the arbitral tribunal, assuming that a permanent court of arbitration shall not have been established (as it should be) for the exercise of arbitral jurisdiction in cases for which the Congress should determine arbitration to be obligatory.

As we shall see hereafter, arbitration can only become an institution capable of peacefully settling difficulties and preventing war on condition that it be obligatory. We believe, therefore, that the Congress ought to have the right to determine arbitration to be obligatory whenever it considers it advisable.

**1234.** When, after the exhaustion of all other means to compel a refractory state to execute its rules or decisions, the Congress shall deem a resort to coercive measures indispensable, it shall have the right to order a pacific blockade and to entrust to certain states of the union or society the task of applying such measures. The states thus designated shall be invested as of right with all the

powers necessary to make the blockade effective, taking into account the special rules which the Congress may have established with respect to the use of such measures of forcible execution. The other states would be bound to abide by the determination of the Congress and to adopt the measures required to make the blockade effective.

The precedents established with reference to the pacific blockade against China and Greece support our proposition, which aims at legitimating this method of forcible execution. We believe that in order to bring about a realization of a more just and rational system of safeguarding the law, the duty of ordering a pacific blockade and declaring it binding upon all the states must be undertaken by the states assembled in Congress, so as to prevent combinations between the more powerful states which might exercise a preponderant influence in international politics.

**1235.** In case of a serious and violent attack upon the legal rules of the international society, the Congress, after the unsuccessful employment of other means of establishing the authority of the law, may authorize recourse to armed force against the states which have successfully resisted peaceful measures of coercion. This would be an example of intervention legitimated by the principles which justify collective intervention and the use of armed force to punish the violation of international law.

When this extreme measure is ordered by the Congress the state or states of the union authorized to resort to armed force to punish violations of the common law of nations and to restore its authority must be rightfully regarded as allies for the purpose. All the other states of the "union" must necessarily be regarded as neutral.

## TITLE II

### THE CONFERENCE

#### DEFINITION

**1236.** The Conference is an agency of high administration, a sort of executive power possessing the faculty to maintain and protect the legal organization established by the Congress and to apply the rules proclaimed to settle questions of general interest which, by their nature, cannot constitute the object of an award.

According to our system the Conference would be an agency of the international society with a purpose quite distinct from that of the Congress. The Congress ought to be empowered to proclaim the rules which shall constitute the basis of the legal organization of the international society. The Conference ought to maintain the legal organization established by the Congress, to assure the recognition of the rules proclaimed and to apply them in appropriate cases.

At the present time there is no substantial difference between a Conference and a Congress. This is due to the fact that the true principles of the legal organization of international society and the agencies best adapted to bring it about are not yet fully understood. When, in the future, a more rational organization of international society will be constituted, the necessity must be recognized of establishing, on the one hand, an agency to draw up, elaborate and proclaim the rules of the society, namely, the Congress, and, on the other hand, a distinct agency entrusted with their execution, namely, the Conference.

At the present time the term "Congress" or "Conference" is indifferently ascribed to an assembly of states united for the purpose of regulating their relations by an agreement. Thus, the term Conference was applied to the assembly of states which met at Berlin in 1884-5 to protect the liberty of navigation, industry and commerce in the regions of Africa, and which proclaimed, by the General Act of February 26, 1885, the rules governing the occupation of African territories for protectorates, and for the improvement of the moral and material condition of the natives. The term Conference was also applied to the assembly that met at Brussels in 1889 to develop and apply the principles enunciated at Berlin by establishing in common accord rules designed for the suppression of slavery, which were proclaimed in the anti-slavery Act of July 2, 1890.

In our opinion, the term Conference is properly applied to the meeting at Brussels, which did not declare new principles but merely applied and developed those which had been proclaimed at the Congress of Paris in 1856 and the Conference of Berlin in 1885, which, like that of Paris, should have been called a Congress. In like manner, the meeting of the states held at The Hague in

1899 and in 1907 called "Peace Conferences" should rather have been called "Congresses," their object having been to enunciate superior principles, to strengthen peace and prevent war as well as rules which should govern certain relations arising out of war. These two assemblages constitute the most important precedent of our time, and furnish an admirable example for future Congresses, as we understand them.

#### CONSTITUTION OF THE CONFERENCE

**1237.** The Conference should be constituted:

(a) By two representatives of the great powers appointed to the Congress. When the representative designated cannot fulfill his duties by reason of death, illness, or other cause, the sovereign of the state shall appoint a representative to the Conference;

(b) By five delegates appointed by the Congress from among the delegates of the people in the Congress;

(c) By the representatives of the state or states which have a direct and material interest in the questions to be discussed by the Conference.

**1238.** The designation of the members of the Conference shall be made by the Congress before the termination of its labors and the members so designated shall be invested with all their powers until the meeting of a new Congress.

**1239.** The admission of the representatives of the state or states which have a direct and material interest in the question to be discussed by the Conference shall be decided upon by the Conference itself at its first meeting.

To justify our proposition it may be observed that, as the Conference must constitute a sort of executive body delegated by the Congress to assure a recognition of the laws enacted by it and to exercise functions of high administration, it is reasonable to hold that the number of its members should be limited. We believe that it should be composed only of representatives of the great powers, because it cannot be denied that the latter are more competent and more interested than other states in preventing disturbances which may arise from the non-observance of the laws enacted by the Congress. Always firm in the desire to avoid in all international questions the preponderance of political influence, we have considered it advisable that there be popular representation in the Conference in order to protect the interests of the international community and the peoples which constitute it.

So far as concerns the representation of the interested state or states it has appeared to us in conformity with general principles of justice and equity that they should be at least permitted to assert their contentions, even though they may not be granted a deliberative vote.

## DUTIES OF THE CONFERENCE

**1940.** The Conference shall be deemed competent:

(a) To apply any legal rules enunciated by the Congress and to settle any question of complex interest which, by reason of its nature, cannot be the object of an award;

(b) To interpret the rules designed to preserve the legal organization of international society as proclaimed by the Congress, without, however, interfering with the substantial authority of these rules.

Nevertheless, in the absence of a special provision in the rules adopted by the Congress, the Conference could, under the particular circumstances of a case, deduce the applicable rule from that enacted by the Congress, either by a literal interpretation or by analogy, provided, however, that a different sense from that clearly expressed be not arrived at nor a new rule of "common" law derived from the general principles of international law;

(c) To order a reference to arbitration, even in the absence of an agreement to that effect between the parties, either in cases where, according to the rules established by the Congress, a submission to a court of arbitration shall be deemed compulsory, or in the case contemplated in rule 825; to settle the difficulties which may arise from the execution of an arbitral award; to examine the grounds of nullity invoked against such an award by the defeated party; and to pass judgment upon the request for revision of the award;

(d) To examine the circumstances which might justify collective intervention in accordance with rules 556 *et seq.*; to regulate such intervention, according to its purpose, when authorized by the Congress, and to control its operation;

(e) To safeguard the rights of aliens injured by the action of a government which shall have abused its authority by arbitrarily violating their rights or by refusing to carry out its engagements or admit the just pecuniary claims of the interested parties, thereby creating an abnormal condition of affairs.

This would be the case if a government arbitrarily and unjustifiably refused to pay its contractual debts;

(f) To authorize the employment of diplomatic measures legitimate in time of peace to assure the execution of an arbitral

award rendered against a state which refuses to recognize or execute it;

(g) To pass upon the revocation or suspension of a treaty concluded between two or more states in the cases designated in rules 787, 788, 826 and 829;

(h) To suspend the execution of a treaty of peace and to refer the matter to the Congress whenever it may consider the stipulations of such treaty as violating the principles which, according to the rules enunciated by the Congress, govern the conclusion of peace.

#### PROCEDURE

**1241.** The meeting of the Conference may take place at the request of one of the states of the union which, in a note communicated through diplomatic channels, shall state the reasons for the desired convocation of the members. Such request must be recognized as well founded by three of the governments of the states which are to join in the Conference.

When the meeting of the Conference requested by one of the states of the union shall be approved by three of the governments of the states invited, these states shall determine by agreement the program for the Conference.

**1242.** When the meeting of the Conference shall be called because of a difficulty between two or more states which, not having been adjusted by peaceful means, threatens to cause war, the parties in dispute shall all be considered defendants.

**1243.** When the parties in dispute are all in the position of defendants before the Conference it is the duty of each party to place at the disposal of the Conference all the documents in support of its claim and those which may be required by the Conference. In the case of good offices or mediation on the part of third powers, they must furnish the relevant papers and all documents necessary to acquaint the Conference with the nature and object of the dispute and the grounds invoked by each of the contending parties in order that an intelligent decision may be reached.

**1244.** The parties called before the Conference shall be permitted to present their own arguments and to take part in the proceedings of the Conference by appointed representatives; but they shall not be entitled to a vote.

They may present to the Conference all the memorials and documents calculated to strengthen their case, so long as the assembly shall not have declared the period for the submission of documents closed.

**1245.** Any decision of the Conference, whether provisional or final, shall be reached by a majority of votes, each state represented and each delegate to the Conference possessing one vote.

**1246.** Every decision shall be drawn up in writing and contain an exact enunciation of the rules of law on which it is based, the grounds for the application of such rules, and a clear and precise judgment.

**1247.** The resolutions of the Conference shall be signed by all participating members who have not been excluded from it for justifiable reasons.

Each member of the minority shall have the right to state the reasons for his dissenting vote and to require mention thereof in the proceedings, but he shall not have the right to refuse to sign the award or resolution adopted by the majority.

**1248.** The decision of the Conference shall be deemed final and it shall be communicated by diplomatic channels to all the member states of the union and notified to the interested parties upon whom it shall thereupon become obligatory.

#### SANCTION OF THE DECISIONS OF THE CONFERENCE

**1249.** The Conference may assure respect for its decisions by proposing to the Congress, by a resolution based upon stated reasons, the use of coercive measures against such members as may refuse to execute the decision.

**1250.** The behavior of any state which might decline to abide by the decisions of the Conference and to execute the orders imposed upon it would be deemed censurable and contrary to the common law of nations, which must govern the states constituting the "union" or society; and it might be necessary to convoke a Congress to prescribe the employment of appropriate coercive measures.

We do not deceive ourselves by assuming that the rules we propose for the rational organization of international society can at present be accepted and enforced. It will require, first of all, a complete transformation of present conditions and a gradual restriction and final and complete elimination of the preponderance of political influence in international relations. It will be neces-



sary for public opinion—which is the manifestation of the legal conscience of the peoples comprising the *Magna civitas*, formerly suppressed, but whose influence upon the operation of international society is constantly increasing—to become preponderant. It will be necessary for peoples, more conscious of their respective interests and legitimate rights, to assert their solidarity. It will be necessary, so to speak, for the legal entities constituting the *Magna civitas* to realize clearly that law and justice, and not private interest and politics, must be the final sovereign of the world.

Whoever considers conditions from a lofty point of view must agree that the life of nations is being transformed by the influence of new ideas; these are limiting, little by little, the preponderant influence of politics, which will be ultimately eliminated, since ideas, not facts, govern the world.

Undoubtedly, on the other hand, politics, failing to base their preponderance upon the irresistible and mysterious power of ideas are now under the necessity of appealing to force. They will not be able to do this indefinitely. The result of the increasing progress of science is that ultimately states will be unable to maintain their armaments on a par with such progress. The wonderful discoveries in ballistics and of more powerful weapons of attack, which make quite useless the present means of defense; the discouraging progress of artillery which reduces to naught any study to perfect resistance by improving the construction of ships; new and more powerful explosives; submarines, dirigible balloons, aëroplanes and other powerful means of destruction—all this, to any thoughtful person, signifies that politics, in course of time, will have to recognize its inability to stand the strain.

At the present writing, August 26, 1908, the two great powers which by their policy seek to acquire preponderance upon the sea, recognizing the difficulty of maintaining their efforts, have attempted to reach an agreement. Having failed in that attempt, they are induced by their rivalry to excessive and ever increasing expenditures. Thus, Great Britain plans to build thirty ships of the Dreadnought type, entailing an expenditure of \$250,000,000 and may be obliged to have recourse to a loan (*Le Matin*, August 23, 1908). In Germany, an increase of taxes of 500,000,000 marks has been announced to meet new naval expenditures.

## TITLE III

### EFFECTIVE MEANS OF SETTLING DIFFERENCES BETWEEN STATES AND PREVENTING LITIGATION

#### OF DIPLOMATIC ACTION

1251. Whenever there arises between two or more states a difference likely to disturb their friendly relations, it must be deemed a common duty of humanity and an act of good policy for all the governments of the states of the international society, and for each of them in particular, to make use of all the means available under the "common" law to settle the difference by diplomatic action and thus, if possible, avoid litigation or recourse to arms.

The true mission of politics and diplomacy should be to bring about the disappearance of all ground of disagreement between the states of the international society and to employ any honorable means calculated to settle differences between them and to insure the maintenance of their friendly relations.

See Fiore, word *Alleanza* in *Digesto italiano*, chap. IV. *La vera missione della diplomazia*.

This principle is at present recognized in article I of Convention I of the General Act of The Hague of 1907, which provides as follows:

Article I.—"With a view to obviating as far as possible recourse to force in the relations between states, the contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences."

The proclamation of principles made by the forty-four states assembled at The Hague, forming the preamble of the convention for the pacific settlement of international disputes, which also comprises arbitral procedure, deserves most careful attention. It reads thus:

"Animated by the sincere desire to work for the maintenance of general peace;

Resolved to promote by all the efforts in their power the friendly settlement of international disputes;

Recognising the solidarity uniting the members of the society of civilized nations;

Desirous of extending the empire of law and of strengthening the appreciation of international justice;

Convinced that the permanent institution of a Tribunal of Arbitration accessible to all, in the midst of independent powers, will contribute effectively to this result;

Having regard to the advantages attending the general and regular organization of the procedure of arbitration;

Sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an International Agreement the principle of equity and right on which are based the security of States and the welfare of peoples;

Being desirous, with this object, of insuring the better working in practice of Commissions of Inquiry and Tribunals of Arbitration, and of facilitating recourse to arbitration in cases which allow of a summary procedure;

Have deemed it necessary to revise in certain particulars and to complete the work of the First Peace Conference for the pacific settlement of international disputes."

#### MEANS DEEMED EFFICACIOUS

**1252.** The means considered efficacious and admitted by all the states which signed the General Act of the Hague Conference of 1907 are:

- (a) *Good offices*;
- (b) *Mediation*;
- (c) *International Commissions of Inquiry*.

Concerning these and other matters, there exists a body of rules which constitute the "common" law of the states represented in the Second Hague Conference of 1907 and signatory of the General Act of October 18, 1907, which contains the different conventions they concluded. Although binding on all the signatory (i. e., ratifying) states, these rules are not fully reproduced in this work, because they are not all reconcilable with our system, for instance, certain rules concerning arbitration. The reader will find, however, printed in italics, a verbatim copy of such of the rules as are not opposed to our principles. There are fourteen conventions and each is divided into articles. The number of the convention will be cited in connection with a textual reproduction of the articles,—using our own numeration.

#### GOOD OFFICES

**1253.** Good offices consist in the attempt of a friendly power to facilitate negotiations between two or more states in controversy.

The good offices of a friendly power may be required by either one of the states in controversy, when they have failed through diplomatic negotiations to reach an agreement and there

is danger of their disagreement becoming so serious as to disturb their friendly relations.

**1254.** Any government of the states of the international society may, without being requested, tender its good offices to the states in controversy, for the purpose of exercising its moral influence toward reconciling them and endeavoring to bring about an amicable agreement or an honorable compromise.

This rule, proposed in the preceding editions of the present work (3d ed., § 1118) is thus formulated in article 3 of Convention I of the General Act of the Hague Conference of October 18, 1907:

"The Contracting Powers deem it expedient and desirable that one or more powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the states at variance.

Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act."

**1255.** Refusal on the part of a government to accept good offices proposed by the government of the opposing state, or proffered by a friendly power on its own initiative will in itself raise a grave presumption that that government does not desire to reach an amicable arrangement. Such refusal virtually constitutes a breach of political etiquette.

**1256.** Good offices voluntarily tendered by a power not interested in the difference should not be declined without good reasons. If accepted by the states in controversy, they must communicate and furnish to such power all the documents and notes relative to the matter in dispute and whatever may be necessary to elucidate the case. They must also advance their arguments in support of their respective claims.

**1257.** The tender of good offices cannot be considered by any of the states between which a difference has arisen as improper or as an unfriendly act or undue interference.

**1258.** The government that has proffered its good offices must act in regard to the two states in controversy with absolute impartiality and moderation and use its moral influence to facilitate conciliation and to effect an honorable compromise of the disputed points; but it may not expect that either state shall accept its proposals to the prejudice of its dignity or honor.

The rules set forth are the same as those in preceding editions.

## OF MEDIATION

**1259.** Mediation is the act of a friendly state which interposes between two states between which a difference has arisen, with a view to composing it and reestablishing good relations between them.

The states between which a difference has arisen may propose to invest one or more friendly states, strangers to the question, with power to interpose as *amiables compositeurs* or mediators in the settlement of the controversy.

The privilege to proffer mediation inheres in every state stranger to the difference.

**1260.** *The mediation proposed can never be regarded by either of the states in dispute as an unfriendly act.*

General Act of the Hague Conference. Convention for the pacific settlement of international disputes of October 18, 1907, art. 3, last paragraph.

**1261.** *The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the states in controversy.*

Article 4 of that Convention.

**1262.** It is the duty of the mediating state, whenever mediation has been requested or proffered and accepted by the states in controversy, to ascertain the precise points and matters in dispute, the negotiations entered into and still pending, and all the evidentiary documents, etc., likely to throw light upon the case.

**1263.** It is incumbent upon the states in controversy, which have requested or accepted mediation, candidly to communicate all information to the mediator, so that he may properly fulfill his mission.

After having accepted mediation, it must be deemed unfair on the part of either state to endeavor to mislead the mediator by unjustified reticence.

**1264.** It must be deemed the mediator's principal duty to consider in good faith and impartially the arguments of each state; to refrain from using his moral influence in favor of either; to act, not as a judge or arbitrator, but as a conciliator, an impartial friend, a skillful and prudent composer of differences, seeking to bring about a reasonable arrangement between the contending

states without in any way depriving them of their full liberty to accept or reject the settlement proposed.

**1265.** *The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute or by the mediator himself, that the means of reconciliation proposed by him are not accepted.*

Article 5 of the Convention cited.

**1266.** *Good offices and mediation undertaken either at the request of the parties in dispute or on the initiative of Powers strangers to the dispute have exclusively the character of advice, and never have binding force.*

Article 6 of the Convention cited.

**1267.** *The Powers which have concluded the Hague Convention of 1907 are agreed in recommending the application, when circumstances allow, of special mediation in the following form:*

*In case of a serious difference endangering peace, the states at variance choose respectively a Power to which they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.*

*For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in dispute cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, which must use their best efforts to settle it.*

*In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.*

Article 8 of the Convention cited.

#### OF THE INTERNATIONAL COMMISSION OF INQUIRY

**1268.** *In disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute*

*an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation. (Art. 9.)*

The provisions governing the international Commission of Inquiry constitute the "common" law of the forty-four states assembled at The Hague, which have signed and ratified the Convention of October 18, 1907, for the pacific settlement of international disputes. They are consequently just as binding upon these states as any rule of positive law. For that reason the full text of the convention is given herein.

N. B. The consecutive numbering of the rules has been preserved, indicating throughout the articles of the convention to which the rules correspond.

**1269.** *International commissions of inquiry are constituted by special agreement between the parties in dispute.*

*The inquiry convention defines the facts to be examined; it determines the mode and time in which the commission is to be formed and the extent of the powers of the commissioners.*

*It also determines, if there is need, where the commission is to sit, and whether it may remove to another place, the language the commission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.*

*If the parties consider it necessary to appoint assessors, the convention of inquiry shall determine the mode of their selection and the extent of their powers. (Art. 10.)*

**1270.** *If the inquiry convention has not determined where the commission is to sit, it will sit at The Hague.*

*The place of meeting, once fixed, cannot be altered by the commission except with the assent of the parties.*

*If the inquiry commission has not determined what languages are to be employed, the question shall be decided by the commission. (Art. 11.)*

**1271.** *Unless an undertaking is made to the contrary, commissions of inquiry shall be formed by choosing the members from among the list of members appointed as members of the permanent Court of Arbitration.*

*The commission selects its President from among its members. (Art. 12.)*

**1272.** *Should one of the commissioners or one of the assessors, if any, either die or resign, or be unable for any reason whatever to dis-*

charge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him. (Art. 13.)

**1273.** *The parties are entitled to appoint special agents to attend the convention of inquiry, whose duty it is to represent them and to act as intermediaries between them and the commission.*

*They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the commission. (Art. 14.)*

**1274.** *The International Bureau of the Permanent Court of Arbitration acts as registry for the commissions which sit at The Hague, and shall place its offices and staff at the disposal of the contracting Powers for the use of the commission of inquiry. (Art. 15.)*

**1275.** *If the commission meets elsewhere than at The Hague, it appoints a secretary-general, whose office serves as registry.*

*It is the function of the registry, under the control of the President, to make the necessary arrangements for the sittings of the commission, the preparation of the minutes, and, while the inquiry lasts, for the charge of the archives, which shall subsequently be transferred to the International Bureau at The Hague. (Art. 16.)*

**1276.** *In order to facilitate the constitution and working of commissions of inquiry, the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not adopt other rules, are recommended. (Art. 17.)*

**1277.** *The commission shall settle the details of the procedure not covered by the special inquiry convention or the present Convention, and shall arrange all the formalities required for dealing with the evidence. (Art. 18.)*

**1278.** *On the inquiry both sides must be heard.*

*At the dates fixed, each party communicates to the commission and to the other party the statements of facts, if any, and in all cases, the instruments, papers, and documents which it considers useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence it wishes to be heard. (Art. 19.)*

**1279.** *The commission is entitled, with the assent of the Powers, to move temporarily to any place where it considers it may be useful to have recourse to this means of inquiry or to send one or more of its members. Permission must be obtained from the state on whose territory it is proposed to hold the inquiry. (Art. 20.)*

**1280.** *Every investigation, and every examination of a locality*



must be made in the presence of the agents and counsel of the parties or after they have been duly summoned. (Art. 21.)

**1281.** The commission is entitled to ask from either party for such explanation and information as it considers necessary. (Art. 22.)

**1282.** The parties must supply the commission of inquiry, as fully as possible, with all means and facilities necessary to enable it to thoroughly understand the facts in question. Likewise they must make use of all means at their disposal under their municipal law to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the commission.

If the witnesses or experts are unable to appear before the commission, the parties will arrange for their evidence to be taken before the qualified officials of their own country. (Art. 23.)

**1283.** For all notices to be served by the commission in the territory of a third contracting Power, the commission shall apply direct to the government of the said Power. The same rule applies in the case of procuring evidence from witnesses residing in foreign territory.

Such requests are to be executed by the Power to which they are directed so far as the means at its disposal and its laws will permit. They cannot be rejected unless the Power applied to considers compliance therewith as prejudicial to its sovereign rights or its safety.

The commission will equally be always entitled to act through the Power on whose territory it meets. (Art. 24.)

**1284.** The witnesses and experts may be summoned at the request of the parties in controversy or by the commission on its own motion, but in every case through the government of the State in whose territory it may be assembled.

The witnesses are heard in succession and separately, in the presence of the agents and counsel, and in the order determined by the commission. (Art. 25.)

**1285.** The examination of witnesses is conducted by the president.

The members of the commission may, however, ask any witness such questions as they consider likely to elucidate and complete the evidence, or obtain information on any point concerning the witness that may be pertinent and necessary to disclose the truth.

The agents and counsel of the parties in controversy may not interrupt the witness when he is making his statement, nor put any direct question to him; but they may ask the president to put such additional questions to the witness as they may deem expedient. (Art. 26.)

1286. *The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the president to consult notes or documents if the nature of the facts referred to necessitates their employment. (Art. 27.)*

1287. *A minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks necessary, which will be recorded at the end of his statement.*

*When the whole of his statement has been read to the witness, he is asked to sign it. (Art. 28.)*

1288. *The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth. (Art. 29.)*

1289. *The commission considers its decisions in private and the proceedings are secret.*

*All questions are decided by a majority of the members of the commission.*

*If a member declines to vote, the fact must be recorded in the minutes. (Art. 30.)*

1290. *The sittings of the commission are not public, nor the minutes and documents pertaining to the inquiry published except by virtue of a decision of the commission made with the consent of the parties in controversy. (Art. 31.)*

1291. *After the parties have presented all the explanations and evidence, and the witnesses have all been heard, the president declares the inquiry terminated, and the commission adjourns to deliberate and to draw up its report. (Art. 32.)*

1292. *The report is signed by all the members of the commission.*

*If one of the members refuses to sign, the fact is mentioned, but the validity of the report is not affected. (Art. 33.)*

1293. *The report of the commission is read at a public sitting, the agents and counsel of the parties in controversy being present or duly summoned.*

*A copy of the report is given to each party. (Art. 34.)*

1294. *The report of the commission is limited to a statement of facts, and has in no way the character of an award. It leaves to the parties in controversy entire freedom as to the effect to be given to the statement. (Art. 35.)*

**1295.** *Each party pays its own expenses and an equal share of the expenses incurred by the commission. (Art. 36.)*

**1296.** *The rules relating to international commissions of inquiry, having been sanctioned by the special convention which is part of the General Act of the second Hague Conference, have, with respect to all the states which subscribed the convention, the authority of their "common" law, and they must all recognize its binding force.*

**1297.** *International commissions of inquiry, in addition to the cases contemplated in the engagements assumed by the States signatory of the Convention of October 18, 1907, may be instituted by virtue of a resolution of the Conference, whenever such measure may be deemed expedient.*

*They may further be instituted by an award of the Permanent Court of Arbitration at The Hague, which, having jurisdiction to decide a dispute upon the points indicated in the compromis, deems it expedient to ascertain certain facts in order to be able to reach a proper decision.*

**1298.** *Whenever the Commission of Inquiry may be instituted by a resolution of the Conference or of the Hague Court of Arbitration, the resolution will define the facts that are to be investigated and will regulate all the particulars contemplated in Article 1269, supra.*

## TITLE IV

### OF INTERNATIONAL ARBITRATION

#### EFFICACY OF ARBITRATION

**1299.** Arbitration must be deemed the most equitable and effective means of settling questions of a legal nature, especially those of interpretation and application of international conventions,—disagreements which diplomacy cannot adjust.

It is imperatively necessary that the empire of law and institutions of a legal order be fostered and maintained by the states of the international society.

Propaganda in favor of arbitration, as an equitable and effective means of settling disputes and of eliminating war, has been the principal object of the movements of the last century, and the common aspiration of various European and American associations organized to substitute the use of armed force by a judicial institution capable of solving such differences as may exist between states. See *supra*, *Introduction*, and the numerous works on the subject, of which the following merit special mention, viz.:

Merignhac, *L'arbitrage international*; Deschamps, *Essais sur l'organisation de l'arbitrage international*; Pradier-Fodéré, *Traité de droit international*, v. VI, §§ 2602-2630; Oppenheim, *International law*, v. II, §§ 12 *et seq.*; Bonfils-Fauchille, §§ 944-969; Darby, *International arbitration*. For the actual practice and operation of arbitration, see Moore, *History and Digest of the arbitrations to which the United States has been a party*, and Lapradelle and Politis, *Recueil des arbitrages internationaux*.

The Institute of International Law discussed this question at length in its sessions at The Hague in 1875 and at Zurich of September 12, 1877, and has even drafted a plan for regulating the procedure of arbitration.

The principle of arbitration has received serious and widespread recognition, the forty-four states assembled at The Hague in 1907 having admitted its value. It should be noted, however, that these states, while recognizing, in the preamble of Convention I, that the permanent institution of an arbitral jurisdiction may prove efficacious in extending the domain of law and fortifying the sentiment of international justice, yet they did not assert that submission to arbitral jurisdiction should be considered compulsory upon the states of the international society, and furthermore, they materially modified its usefulness by vague restrictions. Article 38 reads:

"In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes concerning the above mentioned questions, the contracting Powers should, if the case arose, have recourse to arbitration in so far as circumstances permit."

#### OBLIGATORY CHARACTER OF ARBITRATION

**1300.** Submission to arbitration furnishes evidence of the good faith of the states in controversy, and even though it cannot be regarded altogether as a moral duty, it ought to be declared by the Congress as a legal duty of the states of the international society in all cases in which, by the nature of the dispute, arbitration cannot be regarded as inappropriate.

**1301.** Submission to arbitration shall be conventional or obligatory.

The former originates in that clause of a treaty by which the parties have agreed to refer to arbitration any disputes relative to the interpretation or application of the treaty; or from a special treaty of arbitration concluded by the parties in dispute by which they have agreed to submit it to a court of arbitration; or it may originate in a general treaty of arbitration under which the parties have mutually agreed to submit to arbitration the settlement of any dispute of a legal nature that may arise between them.

The latter derives its obligatory character from a rule laid down by the Congress, or from a decision of the Conference which declares arbitration compulsory under certain circumstances of fact which determine the application of the general principles adopted by the Congress concerning the obligation to arbitrate, or refers the parties to the arbitral jurisdiction in conformity with its attributes in cases (c) and (e) of rule 1240.

Considering that, in principle, arbitration must be regarded as the most equitable and effective means of settling disputes of a legal nature which may arise between states, it appears manifestly desirable to declare it compulsory in all cases where the matter in dispute may be the object of a compromise, and not to leave it to the voluntary choice of the parties in controversy to decide whether or not they shall submit to arbitration.

Inasmuch as the prevailing international sentiment is highly favorable to the suppression of war as much as possible and to the substitution of arbitration therefor, it must be recognized that this measure will become effective only when submission to arbitral jurisdiction is made compulsory. (Compare *Introduction*.)

When states, in their general treaties of arbitration, include a reservation such as is formulated in some of the thirty-three treaties of that kind already concluded, namely, that all disputes of a legal nature shall be submitted to

arbitration, provided, however, that neither the vital interests, nor the independence, nor the honor of either of the states in controversy are involved, and that it must be left for the states themselves to decide whether or not the reservation is applicable, every one understands that submission to arbitration depends entirely on the good faith of the contracting parties.

**1302.** When the parties in dispute are unable to decide whether the difference existing between them can, by reason of its nature and subject-matter, be submitted to arbitration, the final decision of its justiciability must be left to the Conference.

**1303.** When the Conference finds that the matter in dispute is justiciable by arbitration, its decision should be accepted and the states in controversy should be required to submit to arbitration.

When, on the contrary, the Conference finds that the object of the dispute is complex and partakes both of a legal and political nature, it may take upon itself the right to decide.

Nevertheless, should the case involve questions of fact, the Conference could refer the settlement of such questions to arbitrators, in order later to avail itself of their finding in the decision of the principal and fundamental question held in reserve.

**1304.** The Congress must determine what matters must be regarded as obligatory for submission to arbitration on the part of the states of the international society, without power of any reservation on their part.

In cases not specified, when one of the parties in dispute desires to submit to arbitration while the other declines to do so, the willing party may send to the International Office at The Hague a note containing a declaration of its willingness to submit to arbitration.

The International Office will communicate the declaration to the other party.

If the proposition to submit to arbitration should not be accepted, the requesting parties could refer the difficulty to the Conference, which would decide whether or not the case ought to be referred to the Tribunal of Arbitration, and on an affirmative decision to that effect arbitration should be made obligatory.

This rule is based in part on those proposed in our 2d edition (1898, arts. 1069-1070), and in part on the proposition advanced at the Conference of 1907 by the delegates from Peru and China; it was accepted and added to article 27 of the Convention on arbitral justice signed at the Conference of 1890. This article, thus modified, became article 48 of the Convention on the

same subject drawn up by the Conference of October 18, 1907. See that article, paragraphs 3 and 4.

**1305.** It is the duty of the states that have endorsed the principle of arbitration to agree upon the rules which must govern the obligatory character of arbitral justice, in order thus to make possible the conclusion of a universal Convention of arbitration, and also to prevent the obligation to arbitrate as well as the essential elements of the treaty from being violated or rendered nugatory by the reservations of the states in controversy. Otherwise arbitral justice will be unable to fulfill its high mission for the common welfare of all peoples.

The long-discussed question of obligatory arbitration is in a fair way of being solved in a manner satisfactory to all those who have been seeking as far as possible to substitute arbitral justice for war in the settlement of international disputes. The progress made since the first Conference of 1899 is noteworthy. At that time the proposition to endorse the principle of obligatory arbitration was opposed and defeated. The states there represented merely reserved to themselves the right of concluding with one another general treaties of arbitration with a view to making the measure obligatory in certain cases. (Art. 19 of the Convention for the pacific settlement of international disputes, title IV.) No treaties of that kind were concluded until the signature of the general treaty of arbitration of October 14, 1903, between France and Great Britain, after which nearly all the great Powers followed this example and successively concluded general treaties of arbitration. These numbered sixty in April, 1908. Italy has concluded nine: with France (December 25, 1903); Great Britain (February 1, 1904); Switzerland (November 16, 1904); Peru (April 18, 1905); Portugal (May 11, 1905); Denmark (December 16, 1905); Mexico (October 16, 1907); Argentine Republic (October 16, 1907); and the United States (March 28, 1908).

In the recent Conference of 1907, the proposition to conclude a general treaty by which the states would agree to submit to arbitration any dispute of a legal nature, was adopted with certain reservations in the sitting of October 5, 1907, by the delegates of thirty-five states. Only five voted against the proposition and four abstained from voting. The whole scheme of obligatory arbitration which, besides the general formula, specified the cases in which the obligation was established without reservation, was voted by 32 states; but owing to the lack of complete agreement the final solution of the question was postponed.

At any rate, it is especially noteworthy that the obligation of arbitration being admitted in principle, the question may likewise be considered settled in principle. It therefore seems reasonable to assume that in one of the future conferences of states of the international society, a general treaty of obligatory arbitration will be finally concluded.

The following is the text of the declaration voted in the sitting of October 16, 1907:

"The Conference is unanimous:

- (1) In admitting the principle of compulsory arbitration;
- (2) In declaring that certain disputes, in particular those relating to the

interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without restriction.

Finally, it is unanimous in proclaiming that, although it has not yet been found feasible to conclude a convention in this sense, nevertheless the divergencies of opinion which have come to light have not exceeded the bounds of judicial controversy, and that, by working together during the past four months, the collected Powers not only have learned to understand one another and to draw closer together, but have succeeded in the course of this long collaboration in evolving a very lofty conception of the common welfare of humanity."

**1306.** In view of the fact that in order to establish the reign of law in the international society, it must be deemed a legal duty for all the states, members thereof, to submit all disputes of a legal nature to arbitration, while in the general treaty of obligatory arbitration there would be specified the cases in which the parties in controversy should submit to arbitration without reservation, the enumeration of the treaty should be considered as indicative, not as limitative.

It will, therefore, always be optional for one of the litigating parties in a case not contemplated in the treaty of obligatory arbitration, to announce through diplomatic channels its intention to submit the dispute to an arbitral award, and in such case rule 1304 is to be applied.

**1307.** It will be considered as an unwarranted refusal to submit to arbitration:

(a) For one of the states in controversy not to designate the arbitrator or arbitrators in conformity with the stipulations of the "*compromis*."

(b) For a state, in the event of a regular and well-founded challenge by its opponent, in accordance with rule 1315, to the arbitrator named by it, to refuse satisfactorily to overcome the objection, especially by not naming a new arbitrator in lieu of the one opposed.

(c) For a state in controversy, when the arbitrators appointed have been unable to agree upon a third arbitrator or umpire, not to accept any fair proposition proffered by the opposing party for the selection of such umpire, if the treaty of arbitration has not contemplated and provided for such an emergency.

The party which considers itself aggrieved may in that event refer the case to the Conference, calling upon it to determine whether the parties are bound to submit to arbitration.



1308. In case the Conference should be requested to pass upon the refusal to submit to arbitration, it must decide in accordance with the principles of "common" law whether such refusal is or is not justifiable, and, if necessary, require the refractory state to do anything it properly should do in order to make the operation of arbitration possible.

The Conference may, when occasion requires, designate any arbitrators needed, choosing them from the general panel of arbitrators selected for the Permanent Court of Arbitration, and declare obligatory a submission to the jurisdiction of the arbitrators so chosen.

It may undertake to regulate the procedure in case of challenge of an appointed arbitrator and entrust to an arbitral tribunal constituted by it, the duty of passing upon the challenge, reserving to itself the right of confirming or rejecting their decision.

It may draw up the "*compromis*" in case of obligatory arbitration, either by virtue of the principles of "common" law or by reason of its decision declaring arbitration obligatory, when one of the parties in dispute would make arbitration inoperative by refusing to concur in the "*compromis*."

In order to make arbitration really effective whenever it is deemed obligatory between states, it is important to avoid the possibility of this procedure—recognized in principle as the best means of peaceably settling international disputes,—being defeated by reason of bad faith on the part of the states themselves, notwithstanding their agreement to submit to arbitration. Consequently, it is deemed essential that arbitral justice should be so organized as to render its operation effective and to compel the parties in controversy to appear before the court when they have assumed the obligation to arbitrate.

Hence we maintain that not only the arbitration but even the "*compromis*" must be obligatory, and, likewise, in order to avoid any subterfuge or fraud, there should be an institution empowered to assure the operation of arbitral justice when either of the parties in dispute attempts, in any way, to avoid it.

This result will be attained, however, only when the political element in the enunciation of the principles of "common" law will have been eliminated.

#### ADMINISTRATION OF ARBITRAL JUSTICE

1309. Arbitral justice is administered by the Permanent Court of Arbitration constituted under the rules formulated in the Convention signed October 18, 1907, by the representatives to the second Hague Conference, or by the persons chosen as arbitrators

by the parties in controversy in accordance with the rules stipulated in the treaty of arbitration or in the *compromis*.

1310. Except in cases of special agreements concluded by the parties in dispute in a treaty of arbitration between them, the arbitrators must decide issues by applying the rules of "common" law proclaimed by the Congress, or those proclaimed for similar cases or analogous matters; and in the absence of such rules, they will apply the rules that may be deduced from the general principles of international law.

When the object of the arbitration is the interpretation and application of a treaty concluded by the parties in controversy, the arbitrators must settle the dispute by application of the principles laid down in the treaty.

1311. Matters relating to the operation of arbitral justice must be regulated in conformity with the convention concluded at The Hague, October 18, 1907, by the forty-four states represented at the Second Conference; for this convention, so far as these states are concerned, has the authority of conventional positive law and possesses the same authority over other states which may adhere to the General Act of The Hague of 1907 as it has over those which, in case of a difference arising between them, declare that they wish to apply the rules of that convention, although they did not subscribe or adhere to it.

The Convention relating to international arbitration is part of the General Act of October 18 1907; it is the first of the fourteen conventions composing that Act. It is termed: *Convention for the pacific settlement of international disputes*. The subject of international arbitration is regulated therein in Title IV. The provisions of Chapter I are not reproduced herein because they are not in harmony with our system; the other provisions which constitute Chapter II of that title are reproduced textually.

#### ARBITRAL CONVENTION AND "COMPROMIS"

1312. It is incumbent upon the parties between whom a dispute exists, the settlement of which they wish to refer to arbitration, to formulate their agreement on the matter in a "*compromis*," whether their submission to arbitration is the result of a general treaty of arbitration or of a special convention concluded for the case in controversy.

They must also state the disputed points that are in issue and lay down the rules of procedure.

The states which have signed the Convention of October 18, 1907, or those which may later adhere thereto, will be deemed obliged conventionally to abide by the provision of article 52 concerning the "*compromis*" and the other provisions governing procedure.

All other states have the right to agree in the "*compromis*" that they shall submit their dispute to the decision of the Permanent Court of Arbitration established at The Hague, or constitute a special tribunal of arbitration, and that they will adopt the rules of arbitral procedure laid down by the convention of 1907 or settle upon others in the "*compromis*" itself.

Where arbitration would be imposed by a decision of the Conference, the "*compromis*" ought also to be drawn up by that body.

Article 52 of the aforesaid Convention is textually reproduced hereafter under rule 1328.

Enforced submission to arbitration by decision of the Conference may occur in the cases contemplated in rules 1302-1304.

**1313.** The "*compromis*" must be drawn up in writing and signed by the parties.

It must be deemed operative and cannot be impugned except when it lacks the requisites for the validity of a treaty.

It may become inoperative by non-compliance with the conditions under which the parties had agreed to submit to arbitration. This would occur if the dispute should involve several points and the parties succeeded in coming to an agreement on some of them, without expressly declaring their intention of allowing the "*compromis*" to subsist as to the other points in issue.

#### CONSTITUTION OF THE TRIBUNAL OF ARBITRATION

**1314.** The tribunal of arbitration will be deemed constituted as soon as the arbitrators named under the "*compromis*" or under the rules formulated in the Convention of October 18, 1907 (when the parties shall have declared their willingness to comply therewith) have accepted their commission.

It will begin the effective discharge of its duties on the day indicated in the "*compromis*."

**1315.** An arbitrator designated may be challenged and objected to:

(a) When it can be proved that he has an interest in the case;  
 (b) When, a sovereign being appointed, it can be clearly established that the state he represents has an identical or similar question of law which must be decided in consequence of a pending difference with another state;

(c) When the sovereign named as arbitrator has proffered his good offices or mediation in the controversy which forms the object of the arbitration;

(d) When, owing to changed conditions of fact, his impartiality may be seriously questioned, the suspension being based on facts and circumstances of considerable gravity and importance.

1316. When the party to the dispute, to whose arbitrator objection has been made, does not deem the objection well-founded and refuses to appoint another arbitrator conformably to the "*compromis*," the "*compromis*" is thereby invalidated.

Nevertheless, the parties may, by means of a special agreement, name other arbitrators with power to decide upon the merits of the objection.

Such a decision could not be rendered by the tribunal of arbitration constituted under the original "*compromis*."

#### ON THE PERMANENT COURT OF ARBITRATION <sup>1</sup>

1317. *With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Contracting Powers undertake to maintain the Permanent Court of Arbitration, as established by the First Peace Conference, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention. (Art. 41.)*

1318. *The Permanent Court is competent for all arbitration cases, unless the parties agree to institute a special Tribunal. (Art. 42.)*

<sup>1</sup> Here will be found a verbatim copy of the codification worked out by the Conference of 1907 which, as regards the forty-four signatory states and the states which may adhere to the Convention, constitutes, when ratified, the "common" law of the international society.

These provisions, textually reproduced, form chapter II of Convention I. The numbers of the rules, which are placed at the head of the articles of this Convention, correspond to articles 41 *et seq.* of the official text, arbitration being regulated in articles 37 to 97.

## SEAT OF THE PERMANENT COURT

**1319.** *The Permanent Court sits at The Hague.*

*An International Bureau serves as registry for the Court.*

*It is the channel for communications relative to the meetings of the Court. It has charge of the archives and conducts all the administrative business.*

*The Contracting Powers undertake to communicate to the Bureau, as soon as possible, a certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by a special Tribunal.*

*They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the awards given by the Court. (Art. 43.)*

## SELECTION OF THE MEMBERS OF THE COURT

**1320.** *Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.*

*The persons thus selected are inscribed, as members of the Court, in a list which shall be notified to all the Contracting Powers by the Bureau.*

*Any alteration in the list of Arbitrators is brought to the knowledge of the Contracting Powers.*

*Two or more Powers may agree on the selection in common of one or more members.*

*The same person can be selected by different Powers.*

*The members of the Court are appointed for a term of six years. These appointments are renewable.*

*Should a member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for another period of six years. (Art. 44.)*

## SELECTION OF ARBITRATORS

**1321.** *When the Contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen*

*between them, the Arbitrators called upon to form the Tribunal having jurisdiction to decide this difference, must be chosen from the general list of members of the Court.*

*If direct agreement of the parties on the composition of the Arbitration Tribunal cannot be obtained, the following course shall be pursued:*

*Each party appoints two Arbitrators, of whom one only can be its national representative or chosen from among the persons selected by it as members of the Permanent Court. These Arbitrators together choose an Umpire.*

*If the votes are equally divided, the choice of the Umpire is entrusted to a third Power mutually agreed upon by the parties.*

*If an agreement is not reached on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.*

*If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be Umpire. (Art. 45.)*

#### INSTALLATION OF THE ARBITRATION TRIBUNAL AND JURISDICTION OF THE PERMANENT COURT

**1322.** *The Tribunal being thus composed, the parties notify the Bureau of their determination to have recourse to the Court, the text of their compromis, and the names of the Arbitrators.*

*The Bureau communicates without delay to each Arbitrator the "compromis," and the names of the other members of the Tribunal.*

*The Tribunal assembles at the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.*

*The members of the Tribunal, in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities. (Art. 46.)*

**1323.** *The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration.*

*The jurisdiction of the Permanent Court may, within the conditions*

*laid down in the regulations, be extended to disputes between non-contracting Powers or between Contracting Powers and non-Contracting Powers, if the parties are agreed on recourse to this Tribunal. (Art. 47.)*

**1324.** *The Contracting Powers consider it their duty, if a serious dispute threatens to occur between two or more of them, to remind the contending parties that the Permanent Court is open to them.*

*Consequently they declare that the fact of reminding the parties in dispute of the provisions of the present Convention, and the advice given to them, in the interest of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.*

*In case of dispute between two Powers, one of them can always address to the International Bureau a note containing a declaration of its willingness to submit the dispute to arbitration.*

*The Bureau must at once inform the other Power of the declaration. (Art. 48.)*

#### PERMANENT ADMINISTRATIVE COUNCIL

**1325.** *The Permanent Administrative Council, composed of the Diplomatic Representatives of the Contracting Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as President, is charged with the direction and control of the International Bureau.*

*The Council settles its rules of procedure and all other necessary regulations.*

*It decides all questions of administration which may arise with regard to the operations of the Court.*

*It has entire control over the appointment, suspension, or dismissal of the officials and employees of the Bureau.*

*It fixes the payments and salaries, and controls the general expenditure.*

*At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the Council. The decisions are made by majority vote.*

*The Council communicates to the Contracting Powers without delay the regulations adopted by it. It furnishes them with an annual report on the labors of the Court, the working of the administration, and the expenditure. The report likewise contains a résumé of what is im-*

portant in the documents communicated to the Bureau by the Powers in virtue of Article XLIII, (I) paragraphs 3 and 4 (Art. 49). Vide No. 1319 of rules above set forth.

**1326.** *The expenses of the Bureau shall be borne by the Contracting Powers in the proportion fixed for the International Bureau of the Universal Postal Union.*

*The expenses to be charged to the adhering Powers shall be reckoned from the date on which their adhesion takes effect.*

#### ARBITRAL PROCEDURE. "COMPROMIS"

**1327.** *With a view to encouraging the development of arbitration, the Contracting Powers have agreed upon the following rules, which are applicable to arbitration procedure, unless special rules have been mutually adopted by the parties in dispute. (Art. 51.)*

**1328.** *The Powers which have recourse to arbitration sign a "compromis," in which the subject of the dispute is clearly defined, the time allowed for appointing arbitrators, the form, order and time in which the communication referred to in Article LXIII (rule 1339 hereinafter stated) must be made, and the amount which each party must contribute in advance toward defraying the expenses.*

*The "compromis" likewise defines, if there is occasion, the manner of appointing arbitrators, any special powers which may eventually belong to the Tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions upon which the parties are agreed. (Art. 52.)*

#### COMPETENCE OF THE COURT IN REGARD TO THE "COMPROMIS"

**1329.** *The Permanent Court is competent to settle the "compromis" if the parties are agreed to submit it to said Tribunal for that purpose.*

*It is likewise competent, even though the request be made by only one of the parties, when all attempts to reach an understanding through diplomatic channels have failed, in the case of:—*

*(1) A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has become effective, and providing for a "compromis" in all disputes and not either explicitly*



or implicitly excluding the settlement of the "compromis" from the competence of the Court.

Recourse cannot, however, be had to the Court if the other party declares that, in its opinion, the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

(2) A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the "compromis" should be settled in some other way. (Art. 53.)

**1330.** In the cases contemplated in the preceding Article, the "compromis" shall be settled by a Commission consisting of five members selected in the manner indicated in Article XLV (1321), paragraphs 3 to 6.

The fifth member is President of the Commission *ex officio*. (Art. 54.)

#### CONSTITUTION OF THE ARBITRAL TRIBUNAL

**1331.** The duties of Arbitrator may be conferred on one Arbitrator alone or on several arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the Convention of October 18, 1907.

In the event of failure to constitute the Tribunal by direct agreement between the parties in dispute, the course indicated in Article XLV (1321) paragraphs 3 to 6, is followed (Art. 55.)

**1332.** When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitration procedure is settled by him. (Art. 56.)

**1333.** The Umpire is President of the Tribunal *ex officio*.

When the Tribunal does not include an Umpire, it appoints its own President. (Art. 57.)

**1334.** When the "compromis" is settled by a Commission, as contemplated in Art. XLV (1321), and in the absence of an agreement to the contrary, the Commission itself shall form the Arbitration Tribunal. (Art. 58.)

**1335.** Should one of the Arbitrators either die, retire, or, for any reason whatsoever, be unable to discharge his functions, the same

*procedure is followed for filling the vacancy as was followed for appointing him. (Art. 59.)*

#### PLACE OF MEETING OF THE ARBITRATION TRIBUNAL

**1336.** *The Tribunal sits at The Hague, unless some other place is selected by the parties in dispute.*

*The Tribunal can only assemble on the territory of a third Power with the latter's consent.*

*The place of meeting once fixed cannot be altered by the Tribunal except by mutual consent of the parties. (Art. 60.)*

**1337.** *If the question as to what languages are to be used has not been settled by the "compromis," it shall be decided by the Tribunal. (Art. 61.)*

#### PROCEDURE

**1338.** *The parties in dispute are entitled to appoint special agents to attend the Tribunal and to act as intermediaries between themselves and the Tribunal.*

*They are further authorized to appoint and retain counsel or advocates for the defense of their rights and interests before the Tribunal.*

*The members of the Permanent Court may not act as agents, counsel or advocates except on behalf of the Power which appointed them members of the Court. (Art. 62.)*

**1339.** *As a general rule, arbitration procedure comprises two distinct phases,—pleadings and oral discussion.*

*The pleadings consist in the communication by the respective agents to the members of the Tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies. The parties annex thereto all papers and documents pertinent to the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the "compromis."*

*The time fixed by the "compromis" may be extended by mutual agreement of the parties, or by the Tribunal when the latter considers it necessary for the purpose of reaching a just decision.*

*The discussions consist in the oral development of the arguments of the parties before the Tribunal. (Art. 63.)*

**1340.** *A certified copy of every document produced by one party must be communicated to the other party. (Art. 64.)*

**1341.** *Unless special circumstances arise, the Tribunal does not meet until the pleadings are closed. (Art. 65.)*

**1342.** *The discussions are under the control of the President.*

*They are not public unless it be so decided by the Tribunal with the assent of the parties.*

*They are recorded in minutes drawn up by the Secretaries appointed by the President. These minutes are signed by the President and by one of the Secretaries, without which signatures they have no authentic character. (Art. 66.)*

**1343.** *After the close of the pleadings, the Tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party. (Art. 67.)*

**1344.** *The Tribunal is free to consider new papers or documents to which its attention may be drawn by the agents or counsel of the parties.*

*In this case, the Tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party. (Art. 68.)*

**1345.** *The Tribunal can also require the production of all papers and demand all necessary explanations from the agents of the parties in dispute. In case of refusal the Tribunal makes note of it. (Art. 69.)*

**1346.** *The agents and the counsel of the parties in controversy are authorized to present orally to the Tribunal all the arguments they may consider expedient in defense of their case. (Art. 70.)*

**1347.** *They are entitled to raise objections and points. The decisions of the Tribunal on these points are final and cannot form the subject of any subsequent discussion. (Art. 71.)*

**1348.** *The members of the Tribunal are entitled to interrogate the agents and counsel of the parties, and to ask them for explanations on doubtful points.*

*Neither the questions asked, nor the remarks made by members of the Tribunal in the course of the discussions can be regarded as an expression of opinion by the Tribunal in general or by its members in particular. (Art. 72.)*

**1349.** *The Tribunal is authorized to declare its competence in inter-*

preting the "compromis," as well as the other treaties which may be invoked, and in applying the principles of law. (Art. 73.)

1350. The Tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence. (Art. 74.)

1351. The parties undertake to supply the Tribunal, as fully as they consider possible, with all the information required for deciding the case. (Art. 75.)

1352. For all notices which the Tribunal has to serve in the territory of a third Contracting Power, the Tribunal shall apply direct to the Government of that Power. The same rule applies in the case of steps being taken to procure evidence on the spot.

The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to, under its municipal law, will permit. They cannot be rejected unless the Power in question considers them calculated to impair its own sovereign rights or its safety.

The Court will be always entitled to act through the Power on whose territory it assembles. (Art. 76.)

1353. When the agents and counsel of the parties in dispute have submitted all the explanations and evidence in support of their respective contentions, the President shall declare the discussion closed. (Art. 77.)

1354. The Tribunal considers its decisions in private and the proceedings remain secret.

All questions are decided by a majority of the members of the Tribunal. (Art. 78.)

1355. The award must give the reasons upon which it is based. It contains the names of the Arbitrators, and is signed by the President and Registrar or by the Secretary acting as Registrar. (Art. 79.)

1356. The award is read out in public sitting, the agents or counsel for the parties being present or duly summoned to attend. (Art. 80.)

1357. The award, duly pronounced and communicated to the agents of the parties, settles the dispute definitively and without appeal.

1358. Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the Tribunal which pronounced it. (Art. 82.)

1359. *The parties can reserve in the "compromis" the right to demand the revision of the award.*

*In this case and unless there be an agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to materially affect the award and which was unknown to the Tribunal and to the party which demanded the revision at the time the discussion was closed.*

*Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new evidence, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.*

*The "compromis" fixes the period within which the demand for revision must be made. (Art. 83.)*

1360. *The award is binding only upon the parties in dispute.*

*When it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the signatory Powers in ample time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them. (Art. 84.)*

While this rule is binding upon all the states which took part in The Hague Conference of 1907, we deem it expedient to state that, just as any conventional obligation is binding upon all the states which have assumed it, so likewise should its interpretation by an Arbitration Tribunal be binding upon them. It is manifestly proper that in a case involving interpretation, all the interested states should be represented and that accordingly, every Power signatory to the disputed treaty should be informed in ample time to enable them to intervene in the arbitration if they so desire. Should some of them intervene, however, while others fail to do so, we think that the interpretative award is binding upon all the parties signatory to the treaty. The interpretation given in the arbitral award establishes the meaning of the treaty and the nature and extent of the obligation assumed by the parties which subscribed the treaty. Certainly, when duly interpreted, it must have the same legal value for all parties concerned.

If, in effect, the Powers not intervening in the case could disregard the arbitrator's interpretation and bring about another interpretative award, it would follow, in case of dissimilarity of the awards, that the same convention might have a different value with respect either to one or other of the signatory Powers.

1361. *Each party in controversy pays its own expenses as well as an equal share of the expenses of the Tribunal. (Art. 85.)*

## ARBITRATION BY SUMMARY PROCEDURE

**1362.** *With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the Contracting Powers adopt the following rules, which shall be observed in the absence of other arrangements and subject to the reservation that the rules concerning arbitration procedure already established shall apply as far as practicable. (Art. 86.)*

**1363.** *Each of the parties in dispute appoints an Arbitrator. The two Arbitrators thus selected choose an Umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Permanent Court exclusive of the members appointed by either of the parties in controversy and not being nationals of either of them; from among the candidates thus proposed the Umpire is determined by lot.*

*The Umpire presides over the Tribunal which gives its decisions by a majority of votes. (Art. 87.)*

**1364.** *In the absence of any previous agreement, the Tribunal, so soon as it is formed, settles the time within which the parties in dispute must submit their respective claims to it. (Art. 88.)*

**1365.** *Each party is represented before the Tribunal by an Agent, who serves as intermediary between the Tribunal and the Government which appointed him. (Art. 89.)*

**1366.** *The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts be called. The Tribunal reserves the right to demand oral explanations from the Agents of the parties in controversy, as well as from experts and witnesses whose appearance in Court it may deem necessary. (Art. 90.)*

We have reproduced verbatim the Convention concerning arbitration and arbitral procedure, which is part of the General Act signed at The Hague on October 18, 1907, because it virtually constitutes the conventional law of the forty-four states represented at the Second Hague Conference. This Convention has amplified and modified in some particulars the General Act of the first Convention signed July 29, 1899, which contained only forty-seven (47) articles.

Taken as a whole, the conventional rules of arbitral justice of 1907 are very complete so far as concerns the formal matter of procedure in arbitration; but with respect to the substantial part, they constitute rather a doctrinal declaration than a set of legal rules. In effect, the provisions of articles 38 and 48 (given verbatim as a note under rule 1299, and under rule 1324) do not establish any legal duty, so that arbitration is in substance left entirely to the good faith of the contracting states. Article 40 stipulates as follows concern-

ing the general or special treaties of arbitration which may be concluded between states:

"Independently of general or private treaties expressly stipulating recourse to arbitration as obligatory on the contracting Powers, the said Powers reserve to themselves the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may deem it possible to submit to it."

Nevertheless, even in the case of a general treaty of compulsory arbitration, should one of the parties declare that in its opinion the dispute does not come within the category of disputes which can be submitted to compulsory arbitration, the obligation assumed by the general treaty of compulsory arbitration would become useless according to the provision of article 53, No. I (given verbatim in rule 1329).

While admitting in principle the efficacy of arbitration, the contracting states have never established in common accord the requirements legally indispensable for making arbitral justice practically effective; that is to say, they have not yet concluded a convention which prohibits parties in dispute from arbitrarily determining for themselves whether the controversy does or does not belong in the category of disputes which are properly subject to compulsory arbitration. It is, therefore, apparent that much progress will have to be made in this direction in order that arbitration may become the most effective and equitable means of settling disputes between states. To accomplish this purpose it will first be necessary to overcome the resistance of politics and in some measure to modify its tendency.

Another observation deemed appropriate at this juncture has reference to the order of the provisions of the Convention, which are not grouped in a very methodical manner. For example, in the matter of the jurisdiction of the Court of Arbitration, it is necessary to refer to rules scattered here and there and indeed often misplaced (see articles 47, 53, 73, 74 and 83, given herein as rules 1323, 1329, 1349, 1350, 1359). Would it not be better to provide for the grouping of all rules bearing upon the same subject? The same observation may be made concerning the rules of the "*compromis*," etc., but as it will be necessary to revise the Convention in question, it is hoped that provision will be made for better regulation not only of its substance and content but also of its form and methodical arrangement.

#### RULES CONCERNING THE ARBITRATION

**1367.** The arbitral Tribunal, when duly constituted, cannot refuse to render a decision on all the points of the dispute, as determined and stated in the "*compromis*." It ought not to extend its award beyond the matter in dispute.

**1368.** The Tribunal must pronounce its award within a reasonable time, and cannot extend the time indefinitely by claiming that it is insufficiently enlightened on the questions of fact or principles of law which it is to apply.

When the parties in dispute have mutually determined the time limit within which the Tribunal must render its decision, the Tri-

bunal should have the right to determine whether or not it will be able to render its award within the time specified, and to establish such time limit as, in its judgment, the nature of the controversy may require.

Any such determination as to the time limit provided for the award must be communicated to the parties in dispute.

**1369.** The Tribunal, having regard for the declarations of the parties in controversy, may, by a provisional ruling, order the postponement of the case, in order to give the parties due time in which to reach an understanding and to compose their differences.

**1370.** It is the duty of each arbitrator to take part in the deliberation of the Court, save in case of physical impossibility.

In case of justifiable absence of one of the arbitrators, the Tribunal must postpone its decision if the cause of absence be temporary. If, however, the cause is of a permanent character or protracted, it then becomes necessary to provide a substitute for the arbitrator who is unable to discharge his duties, applying the same rules which governed his selection.

**1371.** When the absence of an arbitrator, at the time the award is to be pronounced, is manifestly due to a predetermined conclusion or to a subterfuge on his part, a majority of the Tribunal present should be entitled to prescribe the proper measures for obviating the difficulty and deciding the case.

**1372.** When the measures prescribed by the Tribunal prove ineffective, and serious reasons exist for presuming connivance on the part of the interested Government, such treacherous action ought to be considered as an act of bad faith and contrary to the principles of law; it should constitute sufficient ground to appeal to the Conference, as in case of arbitrary refusal to submit to arbitral jurisdiction or to execute the award.

**1373.** It is the duty of each arbitrator to subscribe the award adopted by the majority, although dissenting. Should one of them refuse, the award signed by the majority will be valid and operative, if the majority has certified such refusal in a declaration duly subscribed.

**1374.** The award must be reduced to writing and must indicate the reasons on which it is based and its effective conclusions on all the contested points submitted to arbitration.



## EXECUTION OF THE AWARD

**1375.** The award, when duly pronounced and communicated in conformity with rules 1354-1357, must be executed in good faith.

**1376.** When the award has imposed a financial burden or requires legislative measures for its execution on the part of the losing party, it has, nevertheless, the authority of a final judgment with respect to the losing state, and its validity and force, so far as the obligation of its execution is concerned, cannot be made dependent upon the approval or ratification of the legislature.

The award, in so far as it settles a controversy between state and state must be considered final, and its authority absolute in so far as it pronounced upon the rights and obligations of the Parties on the basis of the "compromis" submitting the case to arbitration. The decision rendered by a Tribunal invested with such a power must, therefore, have the authority of *res adjudicata* in the relations between state and state, and consequently its findings and conclusions cannot be subordinated to any extraneous conditions. The question of legislative measures which might be necessary to execute the award, is one of municipal public law. It is the duty of the Government, therefore, to do whatever may be necessary to carry out the obligations imposed upon the state by virtue of the award. If, however, it could be admitted that the legislative power could render ineffective the authority of a final judgment (*res adjudicata*) denying to the Government the means of fulfilling the obligations imposed upon the state by a final judgment, it would also follow that the final decisions of the courts of the state could be rendered fruitless and nugatory by refusing the means to execute them. This would imply a strange confusion of the three powers of government which constitute sovereignty.

**1377.** A State which, on being requested by the other party, should refuse to fulfill in good faith the obligations imposed on it by the award, would commit an arbitrary act in opposition to conventional law, and would thus assume an international responsibility warranting recourse to the Conference. The latter could authorize such steps to be taken as might be required for settling the difference and, if necessary, could employ coercive measures permissible in time of peace for compelling the refractory state to respect the final judgment.

**1378.** The suspension of execution of an arbitral award on the part of a losing state could only be justified if that state were to lodge an appeal before the Conference, claiming either (a) that the award was affected with a vice entailing its nullity, or (b) that it should be declared incapable of execution either in whole or in

part, because its findings and dispositive conclusions were in opposition to the constitutional law of the country, or (c) that it should demand its revision on the grounds stated in rule 1359. In that case, even if the faculty of applying for revision should not have been reserved in the "*compromis*," the appeal could not be rejected by the Conference, which would be competent under rule 1240, paragraph c.

#### GROUND OF NULLITY OF AN ARBITRAL AWARD

**1379.** An arbitral award shall be deemed null and void:

- (a) If the decision was not made with the co-operation of all the arbitrators designated to constitute the tribunal of arbitration;
- (b) If it wholly lacks reasons both in fact and in law;
- (c) If the dispositive part is contradictory;
- (d) If it was not drawn up in writing and signed by all the arbitrators, or if the omission to sign by one of them is not recorded in the minutes, establishing the presence of the arbitrator who did not sign and his presence at the time of the decision and vote.

This rule is strictly in accord with that formulated in our first edition (1890) and in the two following ones (1898 and 1900).

We hold that the arbitral award must be deemed null and void if it implies a *manifest* contradiction in its dispositive clauses, that is to say, if the tribunal has ordered something quite contrary to another thing also ordered. It is difficult to understand how Mérignhac, in his notable book on Arbitration, ascribes to us an opinion that we never held, when he states in § 328, page 311: "M. Fiore proposes to reject an award whose character is equivocal"; but, while criticising me, he fails to cite the page of my work containing the opinion which he gratuitously attributes to me.

**1380.** The arbitral award may be impugned by either of the parties in dispute and may be annulled:

- (a) If the arbitrators in their award have transcended the limits of the "*compromis*," or have made an award under a "*compromis*" null and void or which ought to be considered as annulled;
- (b) If it was pronounced by a person who did not possess the legal capacity for sitting as an arbitrator or had become legally incompetent to act in such capacity while the case was pending, or by an arbitrator legally unqualified to replace another who was absent;
- (c) When, upon proof duly furnished, the award must be con-

sidered either as based on error, or as having been extorted by deceit or violence;

(d) When the dishonesty of one of the arbitrators can be fully proved;

(e) When the forms of procedure stipulated in the "*compromis*" on pain of nullity, or those which are established under conventional "common" law and which the parties have not expressly declared their desire to exclude, or those which must be regarded as indispensable under the general principles of international law, have not been observed.

Of course the rules of arbitral procedure accepted by the states which have signed the Convention of 1907, must be deemed binding on those states, when in a "*compromis*" concluded between themselves they have not stipulated for the application of other rules.

#### ACTION IN CLAIM OF NULLITY OR ANNULMENT

**1381.** The claim of nullity or for annulment on the part of the state which advances this plea as a ground for refusing to execute an arbitral award must be made before the Conference. This also applies to the demand of the party requesting the revision of the award in the case contemplated in rule 1359.

**1382.** The Conference called upon to decide as to the nullity of an award must in fact ascertain whether the reasons invoked are well founded and pronounce the award null according to law.

In case of a demand in annulment, it must be examined according to law to determine whether the reasons invoked are meritorious and the Conference must then decide whether, considering the circumstances and evidence adduced, the annulment of the award should or should not be pronounced.

**1383.** When the Conference denies the appeal in annulment and confirms the award, it may order recourse to the means calculated to compel the party to observe and execute the award.

When, on the other hand, it recognizes the claim as well-founded and admits the nullity or annulment of the award, it shall have the right to order a new arbitration, providing, if necessary, for the proper constitution of the tribunal of arbitration.

## SUSPENSION OF THE EXECUTION OF THE AWARD

**1384.** The suspension of the execution of the arbitral award may be authorized by the Conference as a consequence of the appeal of either party under rule 1378 during the time allowed for its consideration of the award.

Should the Conference report favorably on the request for revision of the award, its decision would naturally suspend the execution thereof, and it would then be necessary to consider the effect and provisions of the revised award.

**1385.** Changes occurring in the political constitution of a state do not constitute a sufficient reason for suspending the execution of an arbitral award, so long as the international personality of such state subsists. If, however, the new political constitution of the state should render the award impossible of execution, the party required to do something which, owing to changed conditions, it is quite impossible for it to do should leave it to the same arbitral tribunal to determine what alternative course should be pursued.

## TITLE V

### COERCIVE MEANS IN TIME OF PEACE

#### WHEN RECOURSE TO COERCIVE MEANS IS JUSTIFIABLE

**1386.** No state whose rights have been violated or whose interests have been prejudiced by another state, can have recourse to violence against that state, except after resort to all pacific means, such as diplomatic negotiations, good offices, and mediation, in order to obtain satisfaction for the injury sustained.

**1387.** When the state which has sustained injury and demands satisfaction therefor can submit its claim to arbitration, it must be considered as bound to initiate the arbitration, in accordance with the rules laid down in the preceding title.

**1388.** Indirect coercive means may be deemed lawful only as to certain international differences of a political character, but not as to those of a legal nature, which must be settled in accordance with the rules prescribed in the preceding title.

**1389.** It is highly desirable that, in order to reduce to a minimum the possibility of recourse to violent means for the settlement of an international dispute, civilized states, in controversies of a political nature, should first publicly set forth their respective claims in the matter at issue before resorting to violent means for its settlement. It will be expedient for this purpose that the state alleging to be injured shall set forth in a diplomatic note the reasons upon which it bases its claims, thus making it necessary for the adverse party to justify its conduct, and in this way clearly present the dispute before the bar of public opinion.

The rules that we suggest tend to prevent civilized states from considering themselves both judges and parties, and to obligate them to do everything possible toward preserving their peaceful relations.

We admit, in principle, that a state whose sovereign rights and dignity have been assailed is entitled to obtain satisfaction therefor, and we further acknowledge that recourse to arbitration in such cases does not readily commend itself as a proper or satisfactory means of redress. We believe, however, that a peaceful settlement of the difference is advisable, if it can be effected with

honor, and before resorting to warlike measures it is well that all points in the controversy should be publicly proclaimed.

The mysterious power of public opinion,—now that the telegraph and other modern means of communication inform us almost with the swiftness of thought of what is happening at the farthest end of the world—is becoming greater day by day; and with it, there is developing the sentiment of solidarity of civilized peoples. So it will be deemed the common interest of nations thus to assure peace and leave undisturbed the legal order of the international society. Public opinion, within a state, may be perverted and corrupted by the machinations of contending political partisans; but that of the civilized world remains always impartial, because it is impersonal and disinterested. The moral influence that the press can exercise will continue to increase with civilization, and will be all the more effective with the greater participation of the representatives of the people in the direction of public affairs and in the shaping of foreign policy. Diplomacy, being no longer compelled to act secretly in a cloud of mystery, and the policy of a state being frankly made known to the public, it will hardly be possible for politics to continue to prevail over right and for governments for political ends to disturb with impunity the peace of the international society.

#### LAWFUL COERCIVE MEANS

**1390.** The coercive means permitted in time of peace are those which have the character, properly speaking, of forced restraint but which must, nevertheless, be regarded as indirect means of compelling a state to make amends for an offense or for an injury done.

These measures are:

- (a) Retorsion;
- (b) Reprisals;

Direct coercive means must also be deemed permissible when they are authorized by the Congress or initiated by the Conference.

These are:

- (a) Collective intervention;
- (b) Commercial blockade.

#### RETORSION

**1391.** Retorsion consists in certain acts of violence committed by a state which has sustained injury by another state, the acts being designed to compel such state to desist from its wrongful violation of the rights or interests of the country or of its citizens.

Retorsion may be deemed lawful, provided it is not contrary to legal order.

**1392.** Any state which does not respect the rules resting upon the *comitas gentium*, equity or the principles of natural justice, has no right to complain because another state, injured by its unlawful acts, retaliates in like manner in order to safeguard its rights and interests and those of its citizens.

The basis of these rules is the well-known principle of the prætor Octavius, contained in the Perpetual Edict:

*"Quod quisque juris in alterum statuerit et ipse eodem jure utatur."*

Thus, if a state provides strict measures against foreigners and subjects them to the payment of heavy taxes either for the privilege of residing on its territory, engaging in business, or acquiring and transmitting property, it has no ground for complaint if other states, wishing to protect the interests of their citizens, employ similar means or even more rigorous measures against its citizens in order thus indirectly to compel it to modify its injurious conduct. The same would be true if a state were radically to increase its customs tariffs or in any other way exercise its sovereign rights so as to impair the freedom of commerce or navigation over its territorial waters.

**1393.** It ought to be considered legitimate retorsion for a government to interpret restrictively an extradition treaty under which the other contracting party has refused it extradition, and in analogous cases to refuse to deliver criminals over to that state. In like manner, courts may have recourse to retorsion in interpreting laws which require reciprocity.

**1394.** No state can rely upon the right of retorsion in order to violate the rights of private individuals, or to infringe upon the principles of "common" law, on the ground that the other state has violated those rights or principles to its injury.

Retorsion may be justified only when the act of violence is not contrary to the legal order. Its object may be to prevent a foreign state from exercising its rights in violation of the principles of equity. Unquestionably, retorsion cannot legitimate retaliation, nor permit the commission of a palpable wrong against a state guilty of a similar wrong, to its injury. Modern international law provides for the repression of arbitrary violations of the legal order through the effective means set forth in the preceding title. Therefore a state can never be permitted to violate the laws of the international society on the mere ground that another state has so acted toward it.

**1395.** It is to the interest of states and in accord with political foresight to limit somewhat the field of retorsion in order to avoid fomenting hostile tendencies in the relations between states; recourse to such a measure should only be had when prudent diplomatic action has been unable satisfactorily to modify or dispose of an injurious condition of affairs.

## REPRISALS

**1396.** Reprisals consist in coercive measures resorted to by one state against another state with a view to obtaining from the latter reparation for an injury or offense, or terminating a state of affairs contrary to "common" law.

Reprisals consist in measures of violence based upon acts more serious than those legitimating retorsion. Such acts are not in reality an arbitrary violation of law, but rather an irregular and discourteous manner of exercising a state's right. On the other hand, the facts which give rise to reprisals are contrary to the legal order, as, for instance, the arbitrary occupation of foreign territory, the refusal to pay a debt, the refusal to make reparation for an offense or injury, etc.

**1397.** Reprisals may be justified when by their nature and manner of execution they are not manifestly opposed to the legal organization of the international society.

**1398.** The act of reprisal cannot be deemed contrary to the legal organization of the international society whenever its aim is directly to injure the rights of the state or to cause it a direct or immediate damage with a view to obtaining reparation of some damage or offense committed by it, although this act of violence may indirectly be prejudicial to its citizens.

Any act of reprisal shall be deemed contrary to the legal order which injures directly the rights of private individuals guaranteed by international law or tends to cause a direct and immediate prejudice to private individuals, although accomplished with the intention of indirectly punishing the state.

This rule aims at consecrating the inviolability of private property and protecting the international rights of persons, by expressly prohibiting direct injury to private persons or property through reprisals in order thus to strike indirectly at the state of which those individuals are citizens. The citizens of a state are bound *uti universitas* and not *uti singuli*, to bear the burdens of the state in its international relations. *Si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent.* This maxim finds its true application in the sense that citizens are responsible for the international obligations of the state, but are not individually liable: *Repræsalus in singulos cives alicujus civitatis non dari ob sponsonem et debitum ipsius civitatis.*

During Cromwell's time, an English merchant ship had been captured on the coast of France and confiscated without just grounds. The owner requested the protection of his government and Cromwell addressed a note to Masarin in which he demanded compensation, within three days, for the Englishman who owned the ship and cargo wrongfully confiscated. No heed having been paid to this request, Cromwell, without any further diplomatic negotiations, ordered two English ships of war to seize any French merchant



ships found in the English channel. The war vessels returned to English ports with their prizes and Cromwell had the captured vessels sold with their cargoes, paid out of the proceeds what was due to the injured Englishman and sent the surplus to Mazarin. It is beyond question that such flagrant acts are quite incompatible with the principles recognized under the international law of our time.

**1399.** The following shall be considered as legitimate acts of reprisal without a declaration of war.

- (a) The refusal to pay a debt or obligation due to the state;
- (b) The seizure of property belonging to the state;
- (c) The interruption of commercial, postal, and telegraphic relations established under "common" law;
- (d) The suspension of all treaties or of some of them;
- (e) The withdrawal of certain rights belonging to the state according to "common" law, provided it is not one of the fundamental rights in the absence of which the international personality of the state would no longer exist. Thus, a state could be deprived of the right of representation or of maintaining consulates;
- (f) The closing to a state and to its citizens of certain ports open to commerce, or the prohibition of exporting goods absolutely essential to the state;
- (g) Expulsion of the citizens of a foreign state, provided it has denied freedom of residence or has expelled nationals;
- (h) Denial of the privileges and immunities granted to citizens of the foreign state;
- (i) Arrest of the public officers of a foreign state, if it has arrested some officer of the state, or has denied him the right freely to leave the foreign territory in order to return to his own country;
- (j) Any other form of coercive measure authorized by the Congress or by the Conference as reprisals.

Recourse to reprisals, as understood and admitted up to the present time, is inconsistent with the principles that must govern the legal organization of the international society. The most powerful states have admitted that, by taking advantage of their strength, it is possible for them to take the law into their own hands and thus impose their pretensions upon weaker states, if necessary by armed force; while the use of these violent measures on their part, legitimated as reprisals in time of peace, did not bring to an end the state of peace and the application of the international law in force in time of peace. Thus, they have come to the point of justifying the use of any coercive means imposed by armed force, in order either to obtain justice in their own right, or to protect the interests of nationals, or to compel a government to pay contractual debts claimed by private persons, and similar ends. As to this last point, the Hague Convention of 1907 (the second of the General Act) relating

to the limitation of the use of armed force in the collection of contract debts denies that reprisals can be justified on any such ground.

Article 1 of this Convention reads:

*"The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any 'compromis' from being agreed on, or, after the arbitration, fails to submit to the award."*

This Convention thus limits the principle which had prevailed until 1907 that the state might employ force to obtain its alleged rights. Yet it is to be noted that the provision contained in the second paragraph still admits the use of armed force in the cases therein stated. Should our propositions concerning compulsory arbitration and the use of coercive means be accepted, it would result in eliminating recourse to armed force in time of peace without first resorting to all legal means calculated to prevent the violation of law.

The Convention, which bears the date of October 18th, 1907, was not actually signed until June 30, 1908, with numerous reservations. By carefully examining these reservations, it will enable one better to appreciate the rules that we propose, the object of which is to assure the sovereignty of law in the international society.

**1400.** It cannot be deemed permissible to resort to reprisals without first attempting to settle the differences by diplomatic negotiations and other measures recognized by international law.

**1401.** In questions of a legal nature which in case of dispute might constitute the object of an arbitration, recourse to reprisals must be deemed inadmissible.

**1402.** Every civilized state is bound not to have recourse to reprisals in order to assert its rights when it can make use of ordinary means to obtain recognition thereof.

**1403.** When a state can be held responsible for an offense committed against the dignity or honor of another state and, although invited to give proper satisfaction it declines to do so and by subterfuge seeks to evade its obligation, the offended state may with justice resort to reprisals to compel it to make satisfactory amends.

In such case, the nature and extent of the reprisals must be proportionate to the seriousness of the offense.

Offenses against the dignity and honor of a state cannot be the object of an arbitration, and the reparation required cannot be long deferred. Should diplomatic negotiations prove of no avail, the offended state may then resort to reprisals. In that case, it is permissible to present a claim supported by armed force and by the threat of a declaration of war formulated as an *ultimatum*.

The right of legitimate defense must be admitted between states, and,

when honor and dignity are involved, it is futile to prolong matters by detailed procedure in order to obtain what may properly be exacted without delay.

Nevertheless, we believe it to be essential that a public presentation of the circumstances of the case should be made in conformity with rule 1389.

#### THE SEIZURE OF MERCHANT SHIPS OR EMBARGO

1404. The seizure of the merchant ships of a state, lying in the ports of another state claiming to have a cause of complaint, cannot be deemed a lawful form of reprisals.

An embargo laid upon these ships in order thus to compel a state to satisfy the claims of the seizing state must be regarded as absolutely contrary to the principles of international law.

It has been sought to justify the seizure of merchant ships of a state, against which a claim is asserted, as a reprisal, permissible in time of peace, in order thus to compel it to satisfy claims directed against it.

This pernicious measure is currently called *embargo* (a Spanish word, derived from the verb *embargar*, to seize). History furnishes numerous instances of such a measure having been taken in the ports of a state having grievances against the state to which the ships belonged and which it threatened with war and confiscation of the ships if the demands of the claimant state were not satisfied. Cf. Pradier-Fodéré, *Droit international*, v. 5, § 2478.

We consider this coercive measure as absolutely unjustifiable. The property of private persons, which ought to be held inviolable in time of war, should certainly, and with even more reason, be regarded as sacred in time of peace. Therefore, embargo of merchant vessels must be considered to be a violation of the principles of international law.

We shall refer hereafter to *embargo* as a police measure in case of an impending declaration of war. (See rule 1449.)

#### INTERVENTION IN CASE OF LEGITIMATE INTERFERENCE

1405. Intervention in cases of legitimate interference can only be justified when it has been authorized by the Congress as a coercive measure against a state which has violated the principles of international law or the rules proclaimed by the Congress as conventional laws of the states constituting the international society.

One of the most noteworthy cases of intervention under the principles which may justify collective interference for the purpose of regulating the internal affairs of a state and to assure order therein, without infringing the principle of sovereignty and independence, is that provided for by the Algeiras Conference with respect to Morocco. France and Spain were entrusted with the execution of the measures adopted in common accord in the General Act of April 7, 1906, which was signed by Austria-Hungary, Belgium, France, Ger-

many, Great Britain, Italy, Morocco, the Netherlands, Portugal, Russia, Spain, Sweden and the United States.

**1406.** The intervention thus authorized can only have as its object the assurance of respect for international law and the repression of violations thereof.

**1407.** Intervention as a coercive measure ordered by the Congress can take place whenever, in accordance with rules 556-562, collective interference is legitimate and necessary to enforce respect of international law.

Considering the fundamental principle that states constituting the international society are jointly and severally concerned in the maintenance of the legal organization of that society, it logically follows that after peaceful means have proved ineffectual to bring to an end a state of affairs antagonistic to such organization, recourse to coercive measures is required. In order, however, to determine their advisability and regulate their employment, the judgment of a superior authority is necessary.

To allow one or more states independent authority to decide and act in that respect would, manifestly, be unwise and would open the way to arbitrary acts, inspired perhaps by selfish or interested motives. Therefore, we deem the intervention of the Congress and its authorization as an indispensable prerequisite to order and regulate collective interference.

We cannot share the opinion of Rivier, who would recognize friendly intervention (v. II, § 58), nor that of Oppenheim, who favors the intervention of a state as a sort of dictatorial interference to end a conflict. (*International Law*, v. II, §§ 50 *et seq.*)

**1408.** When the Congress has authorized intervention, the state or states which have been entrusted with the mission of employing coercive measures against the culpable state, must observe the rules established by the Congress which commands them, and, in all matters not covered by special instructions, must comply with the general principles of international law.

#### COMMERCIAL BLOCKADE

**1409.** Commercial blockade, called pacific blockade, consists in the investment of a port or coast of a state, effected and maintained by means of a number of ships of war sufficient for prohibiting access thereto or egress therefrom, and designed to interrupt completely the relations and especially commercial transactions between the citizens of the state or states which have declared the blockade and the state against which this coercive measure is employed.

**1410.** Commercial blockade can only be considered lawful when authorized by the Congress as a coercive measure directed against a state of the international society guilty of violating the conventional law proclaimed by the Congress, or against a state not a member of that society in case of serious infringement of the principles of international law.

**1411.** The purpose of commercial blockade must be to prevent the importation and exportation of any kind of merchandise through the port or ports of the state against which it has been ordered and effectively maintained, and thus to cause real damage to the culpable state, in order to compel it to remedy the unlawful conditions which caused the blockade to be instituted.

**1412.** Commercial blockade in time of peace cannot have the same legal character as in time of war. Consequently, it cannot assume all the privileges which legitimately belong to belligerents during war, but only such rights as are compatible with the purpose of such coercive measure.

There has been much discussion as to the legitimacy of blockade in time of peace, and many authors have contended that it could not be regarded as a regular coercive measure according to international law. Such is the view of Fauchille, *Du blocus maritime*, pp. 38 *et seq.*; of Geffken, *Revue de droit international*, 1887; of Testa, *Le Droit public international maritime*, p. 229; of Woolsey, *International Law*; of Gessner, *Le droit des neutres sur mer*; of Pradier-Fodéré, *Droit international public*, v. 5, §§ 2483 *et seq.*; of Bonfils, 5th Ed., p. 992; and of Martens, v. 3, p. 175.

The opposite view also has its partisans, among whom we may cite Heffter, *Droit international*, § 111; Bulmerincq, *Journal du droit international privé*, 1888, p. 569; *Annuaire of the Institut de droit international*, 1887; Perels, *Manuel de droit maritime* (Arendt's translation), § 30, p. 180; Rolin Jacquemyns, *Revue de droit international*, 1876, pp. 618, 623; Wharton, *International Law Digest*, § 364; Fiore, *Diritto internazionale pubblico*, 2d ed., 1884, translated into French by Ch. Antoine, § 1629, and 3d ed., 1888, § 1324; Oppenheim, *International Law*, § 44. Cf. Calvo, *Le droit international*, who cites many historical facts and the opinions of several publicists in his 4th edition, v. 3, §§ 1832 *et seq.* [See also, Hogan, *Pacific blockade*, London, 1908—Transl.]

It seems to us that the principal reason for the controversy lies in the fact that no clear distinction is made between the legal character of the blockade used as a coercive measure in time of peace and that of the blockade as practiced in time of war. Certainly blockade, with all the rights it confers upon the belligerent against the enemy and with respect to neutrals, can only properly exist when war is declared. To admit blockade as an operation of war in the absence of a state of war would be a true anomaly. This anomaly disappears when the line is clearly drawn between the two kinds of blockade and when it is considered that the states constituting the international society cannot be denied the right to utilize coercive means against a member state and to cause it a certain prejudice in order to compel it by force to submit to the decision

of the Congress. Now, commercial blockade is one of these coercive means the employment of which is manifestly less harmful than war.

As regards states which do not belong to the international society, commercial blockade can be justified in case they seriously violate the principles of international law, which must be deemed under the collective protection of civilized states in so far as it consecrates the rules that are indispensable for assuring the relations of states in the international society.

**1413.** It is the duty of the Congress which has ordered a commercial blockade to publish notice thereof through diplomatic channels; to fix the date on which it shall take effect; to determine on what coast and against which ports it shall extend; to grant a reasonable time limit to all ships which may have entered the ports before the declaration of blockade to complete their operations and depart therefrom; and, finally, to determine which state shall enforce the blockade.

#### EFFECTIVENESS OF THE BLOCKADE

**1414.** A commercial blockade is only effective from the time the blockading fleet actually invests the blockaded port or ports with a force sufficient to prevent the egress or entrance of ships.

**1415.** The blockade must be deemed compulsory and must be respected by all the vessels of the merchant marine of the states constituting the international society.

It may also be applicable to third powers, if this has been expressly stated in the note which notified the blockade diplomatically.

The blockade ordered by the Congress and notified through diplomatic channels must be deemed compulsory upon all the states constituting the international society, by reason of the authority possessed by the Congress to order recourse to coercive measures designed to assure respect for the laws mutually adopted by the states in question.

It may likewise be effective as to third powers by imposing upon the citizens of those powers the prohibition of egress from or entrance to the blockaded ports by any ships, and this by virtue of the community of interest on the part of all civilized countries in safeguarding the principles of international law. States so authorized by the Congress cannot be denied the right forcibly to exercise control over the territorial waters of the state against which the blockade is declared so as to punish it for misdeeds and compel it to respect international law. In such a case, without declaring war upon the culpable state, the closing to commerce of some or all of its ports may be ordered and universal respect for the blockade induced, not by virtue of the rights of war, but on the ground of effective possession of its territorial waters by the states which have forcibly occupied them and have substituted themselves there in the exercise of the rights of sovereignty of the blockaded state.

The states which maintain an effective blockade can prohibit the ships of all countries from crossing the blockade line. They can neither punish them, nor subject them to the laws of war applicable in case of breach of blockade, but they can, under the conditions determined in the following rules, prevent them from crossing the blockade line.

We do not maintain that all this can be strictly reconciled with the freedom of the sea and the liberty of navigation in time of peace. We acknowledge it to be a derogation from the principles upon which must be based the respect due to such freedom, and for that reason we deem the authorization of the Congress to be indispensable.

Such derogation, as an exceptional measure, may be justified if, authorized as a coercive means less disastrous than war, it may serve to attain the same object.

**1416.** The blockading squadron must be considered as authorized to prevent merchant vessels from crossing the blockade line, adopting the least injurious means of compulsion.

The commander of each of the war ships of the blockading fleet, who is within signaling distance of a merchant ship about to enter the blockaded zone, must request her to stop, observing the rules established for the exercise of the right of visit and search, and notify the captain not to cross the blockade line. Such notification must be conveyed by an officer of the war vessel and entered on the ship's journal.

**1417.** Should the vessel on which this notification has been served attempt, nevertheless, to cross the blockade line, any ship of the blockading squadron could arrest her, adopting, however, the least injurious means.

The vessel once captured, the commander of the blockading fleet may detain her. Should the culpable vessel give sufficient and satisfactory guaranty that she will not again attempt to cross the blockade line, the commander of the blockading fleet may allow the vessel to proceed; otherwise, he shall have the right to order the seizure of the captured ship and detain her until the blockade is raised.

**1418.** A merchant vessel which has attempted to violate, or which has actually succeeded in violating the blockade cannot be subjected to capture, nor to any other penalty applicable in case of breach of blockade in time of war; such vessel must be restored to her owners immediately after the raising of the blockade. She cannot, however, claim reparation for injury arising from the seizure. This rule will also apply to the merchant ships of the blockaded state.

The rules proposed are no doubt justifiable with respect to the states constituting the international society by virtue of the conventional rules adopted by them on the subject of commercial blockade in time of peace. As to the remaining non-member states, regarding which, according to paragraph 2 of rule 1415, we consider that the commercial blockade should be likewise efficacious, we acknowledge, at the same time, that the limitation of the freedom of commerce and navigation is not, as a general principle, strictly justifiable. We observe, however, that in the international society, states must sometimes suffer certain limitations of their right for reasons of public welfare, as private persons do in civil society. Certain limited forms of expropriation of rights may in certain cases be justified by supreme necessities or general welfare and by the advisability of securing the best results and of avoiding the worst in the interest of the community and of the *Magna civitas*.

**1419.** When a ship which has violated the blockade belongs to the navy of a state, and it appears that she has entered or left the blockaded port in order to carry on a commercial operation, she thereby involves the responsibility of her country.

Commercial blockade, as a coercive measure resorted to without completely breaking off peaceful relations, was often utilized in the course of the nineteenth century. A noteworthy example is the blockade of the coasts of Greece in 1827 by the fleets of France, Great Britain and Russia in order to cut off communication between Turkey and the army of Ibrahim Pasha which was operating in Morea [Peloponnesus]. In 1838, a French squadron blockaded the ports of Mexico and took possession of the fortress of San Juan d'Ulloa, while the French government kept on asserting its pacific intentions. We need not mention other instances of pacific blockade, but would refer the reader to the following works where this subject is discussed: Calvo, 4th ed., v. 3, §§ 1832 *et seq.*; Bonfils-Fauchille, § 987; Pradier-Fodéré, v. 5, §§ 2483 *et seq.*

We deem it expedient, however, to note that pacific blockade, as it has been understood up to this time, is nothing but a deplorable recognition of the preponderance of force. In other words, the strongest, in order to enforce its claims, resorts to the simplest measures, such as reprisals and blockade, and when these means prove inadequate, confiscates ships, even in time of peace.

When can recourse be had to pacific blockade? According to present international law, the answer would be, when the Power enforcing it has sufficient strength to impose it.

In 1850, a certain Pacifico, a Jewish merchant, who claimed to be a British citizen merely because he was born at Gibraltar, and demanded indemnity from Greece for the loss of his property, instead of resorting to the courts, succeeded in obtaining the diplomatic protection of the British government. Lord Palmerston, head of the British cabinet, insisted that Greece should pay the indemnity claimed, and, as it was not paid promptly, he had the coast of Greece blockaded. As if this was not yet sufficient, he granted letters of reprisal, had Greek vessels in the open sea seized and declared an embargo upon those in British ports. Great Britain won her point only because she was the stronger of the two states in controversy; but it is impossible to find a principle of law justifying so iniquitous a procedure, which was condemned by the British Parliament itself and stigmatized as improper, unjust, and brutal by Lord Stanley in the House of Lords. It can only be justified on the ground



that in the international society as constituted to-day, the right of the strongest is always the better.

According to the principles of justice, the right of Greece was better founded than that of Great Britain in the particular instance cited. Greece alleged that she could not indemnify the claimant, who professed to have suffered injury, if the latter did not present his claim to the courts of Greece which alone could determine the title to and amount of the indemnity. Yet Greece, because she was the weaker, was compelled to recede from her contention, and to pay what was required of her. All Europe was indignant at the conduct of Great Britain, but no third Power saw fit to interpose to defend the right of the weaker state.

Thus, until this day, pacific blockade has served only to strengthen the arbitrary dominance of the more powerful states, but without contributing much, if anything, toward assuring the reign of law within the international society.

## TITLE VI

### THE LAST RECOURSE FOR JURIDICAL PROTECTION. WAR

#### WHEN IS WAR JUSTIFIABLE?

**1420.** The international right of coercive action by means of armed force should not be exercised by any state until it has exhausted all diplomatic, legal and coercive means admitted in time of peace for the settlement of a controversy existing between itself and another state, or unless the nature of the controversy and special circumstances surrounding it render immediate action imperative. The exercise of that right constitutes war.

The right of armed action inheres in the state as a last resort in protecting itself and those belonging to it, whenever the offending government arbitrarily refuses to submit to the authority of law and all pacific means looking to a settlement of the dispute have been exhausted. It then becomes a necessity for the injured state, in the absence of any supreme power having authority to direct armed force, to protect its own right and seek proper redress for the violation thereof, through action directed against the government which arbitrarily persists in refusing satisfactory reparation.

**1421.** The exercise of the right of war on the part of a state is justifiable only when the necessity of resorting to this extreme and always pernicious measure arises in order to defend its own right from arbitrary violation by armed force.

The protection of the interests of dynasties can never justify war; nor can war be rightfully invoked in the interests of politics posing in disguise as the interests of the people.

"Whoever reflects upon the terrible effects and lamentable consequences of war is easily convinced that it absolutely ought not to be undertaken in the absence of the most serious grounds." Vattel, *Le droit des gens*, Pradier-Fodéré's edition, Bk. III, chap. III, § 24, t. XII, p. 366.

**1422.** It is the duty of any state which, in order to protect its right, feels disposed to declare war upon another state, to consider seriously the grave responsibilities which the exercise of the right of war entails.

"Kings"—wrote Fénelon—"ought to beware of the wars which they undertake. They ought to be just. But this is not enough; they must be necessary for the public welfare. The blood of a people ought not to be spilled, except to save the people in extreme necessity." *Télémaque*, liv. XII.

#### INTERNATIONAL WAR AND CIVIL WAR

**1423.** War, as a legal form of international action, consists in the use of military forces on the part of one or more states against one or more states, in order to settle a controversy involving international law.

Internal armed conflict between the citizens of a state who undertake hostilities for the object either of modifying the political constitution of the state or of seceding and forming an independent state, constitutes civil war, which, as a form of action within the state, is governed by municipal public law.

**1424.** Civil war cannot be subjected to the same rules as international war. If, however, one or more foreign governments should expressly recognize the rebels as belligerents, this would have the effect of transforming the character of the war and the relations between the combatants and the recognizing governments, so that the rules of international war would apply.

War, as a form of international action, brings about international legal consequences and must be governed by international law. In fact, it modifies the law which governs the international society in time of peace, not only as regards the belligerents, but also as regards third powers not involved in the war. Such exceptional modification of the laws of the international society cannot be effected by an armed struggle having for its object the solution of an internal difference concerning public law, but can only be warranted by war in its true and broader sense as a legal form of international action.

It is, therefore, necessary to determine precisely whether an international war or a civil war exists, in order accurately to establish the rules to be applied. Even though it be conceded that a people, not constituting a State, may be induced to establish one and that, having exhausted all other means, it may have recourse to armed force in order to assert and defend this right against a government which refuses to acknowledge and opposes its purpose,—such a form of action is not primarily international war, but civil war, which must be governed by municipal public law and not by international law. It is true that such internecine strife, by reason of its form and development, may under certain circumstances concern and affect international society and may eventually require the application of international law; but that will then be due to other reasons. (Cf. rules 556, 558 and 700.)

**1425.** The legal character of civil war may be considered as legally transformed when the insurgents succeed in occupying a considerable portion of the territory of the state they oppose, and in establishing therein a government operating as a regular government and capable of assuming responsibilities as such.

Should the new government thus established be then recognized by the majority of the states of the international society, and should war continue, it could no longer be considered a civil war, but an international war subject to the rules of international war.

In principle, the legal character of international war must be attributed to armed struggles between states, but not to internecine struggles. Nevertheless, it must be recognized, by way of illustration, that although at the start a war of secession must be deemed a civil war, yet when the seceders have been able to constitute themselves as an independent state, the former state is bound to be considered as provisionally divided in two, and the new state, as a political entity, should be admitted to enjoy the rights inherent in those who are in fact in possession of sovereign rights, who *de facto regit*. (Cf. rules 57, 60, 61, 128, 130, 132, 168.)

We believe that the same rules should apply in case of colonial war, when colonies succeed in constituting themselves as independent states. Even though the mother country may not have recognized the new state and should continue to wage war against it in order to restore the colonial bond, it would be illogical to regard such struggle as a civil war. Its legal character is that of international war. (Cf. rules 168, 174, 176.)

**1426.** The legal character of international war cannot be assigned to an armed struggle between a vassal state and its suzerain state. Such character may, however, be assigned to a war between a protected state and the state which exercises the protectorate.

The vassal state has no international personality distinct from that of the suzerain state, and manifestly there cannot exist between them an international war. (Cf. rules 113 and 114).

While the relation of protectorate modifies the legal status of the protected state, it does not, however, entail the loss of the international personality of that state. (Cf. rules 116 *et seq.*)

See, on the legal character of war, Oppenheim, *International law*; Phillimore, *Commentaries upon international law*, III, § 49; Pradier-Fodéré, *Traité, de droit international public*, v. VI, §§ 2658 *et seq.*; Pillet, *Les lois actuelles de la guerre*, chap. I, no. 7.

#### THE DECLARATION OF WAR

**1427.** Any state wishing formally to wage war against another state should give notice of its intention to resort to armed force for the settlement of the controversy, by publishing a diplomatic

note wherein the reasons of the *casus belli* are summarily stated. It cannot then begin hostilities without a preliminary declaration of war.

1428. Hostile acts and the exercise of the rights of war, as regards both the belligerents and neutrals, are justifiable only from the time when war shall actually have begun, either through formal declaration, or through an *ultimatum* notified with indication of a peremptory time limit for the commencement of hostilities.

An *ultimatum*, without formal intimation of war in case of its non-acceptance, cannot be equivalent to a declaration of war.

One of the reasons assigned for advocating the elimination of the formal declaration of war, was that of preventing the enemy from having time in which to complete his preparations for defense and thus rendering the other state the better prepared to make the offensive attack. This danger may be avoided, but the exercise of the right of war before the regular opening of hostilities is not justifiable on any ground.

It is not at all necessary that the *ultimatum* grant a long time limit. Strictly speaking, a few hours might suffice to answer it, if the other state should decide to accept the demands categorically formulated under threat of war.

At the time of the war of 1866, Bismark granted to Hesse, Hanover and Saxony a time limit of twenty-four hours by the *ultimatum* of the 15th of June, and, no answer having been made, the Prussian army, on the 16th of June, entered the territory of Hanover and, on the 17th, occupied its capital.

At the time of the Transvaal war, the *ultimatum* notified October 10, 1899, under threat of war, granted less than 24 hours time to Great Britain.

1429. Formal declaration of war cannot be deemed incumbent upon a state which finds itself obliged to repel by force the armed aggression of another state, nor upon a state against which war has been declared and which finds itself compelled immediately to defend itself. In such cases, however, it seems desirable that the pending difficulty be notified to neutral powers through a public manifesto.

1430. After the declaration of war, or after the expiration of the peremptory time limit fixed in the *ultimatum*, the law of peace must be considered as having become inapplicable, and the law of war as having come into force both as regards belligerents and third powers.

1431. Should any state commence hostilities without previous declaration of war, it shall be deemed dishonorable and contrary to modern international law.

The rules proposed are in accord with our previous opinions. Fiore, *Diritto internazionale pubblico*, 1st ed., 1865, p. 387; *id.*, 2d ed., §§ 1551 and

1879; former editions of the present work, arts. 936 *et seq.*, 1st. ed., 1890; art. 1146, 3d ed., 1900. They have been solemnly sanctioned in the third Convention of the General Act of The Hague of 1907, which provides as follows:

*Article I.—The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.*

*Article II.—The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.*

*Article III.—Article I of the present Convention shall take effect in case of war between two or more of the Contracting Powers. Article II is binding as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention.*

#### WHEN DOES WAR EXIST IN FACT?

**1432.** Even when a state engages in armed hostilities against another state without having previously exhausted all the measures agreed upon for the pacific settlement of the dispute, and without having formally declared war, the struggle will, nevertheless, possess the true character of war whenever made with organized armies and fleets, and with the object of settling by force of arms a contest involving international law.

Leaving aside the question of the legitimacy of war, there is no doubt that an open struggle conducted by organized military forces for the purpose of settling a question of public law, cannot lose its legal character on account of the non-observance of the measures which in ordinary cases should precede the opening of hostilities. It might well happen that a war breaks out between one state and another which is not a member of the international society, or that a state belonging to the international society places itself outside the "common" law by forthwith employing armed force for settling a dispute with another state. It might also happen that a state, without having recourse to pacific means to secure the recognition of its rights, asserts and supports them by armed force. In such a case, it cannot be maintained that an armed struggle between two or more states should not be characterized as war. When the cause of the hostilities is a violation of law and is clearly characterized as an arbitrary act, while having a decisive influence upon the legitimacy or illegitimacy of the war, it cannot affect the armed struggle as a state of actual war, even as to a state which employs armed force to disregard the right of others or to violate the laws of the international society.

**1433.** The state of war must be considered as existing *de facto* from the time when either of the contending states has committed the first hostile act.

While it is desirable according to the just principles of modern law that the state of war, with all its legal consequences, should be considered as existing

only from the time the state has made known in a precise and unequivocal manner that it resorts to armed force for the protection of its rights, yet if one of the contending states commits the first act of hostility, that fact will be deemed sufficient to establish the beginning of a state of war. Any discussion as to the regularity of the procedure, the legitimacy of the acts of violence and hostility previous to the declaration of war must be considered as fruitless. Once the act of hostility is accomplished, war must be deemed as having, *ipso facto*, begun.

#### GENERAL EFFECTS OF WAR

**1434.** The general and immediate effect of war is to render applicable, from the time it begins until peace is concluded, the laws, usages, and international conventions that relate thereto, both as between the belligerents and with respect to neutral states.

**1435.** An immediate effect of war is to make lawful between the belligerents, *ipso jure ipsoque facto*, acts of violence against persons who take an active part therein and against the enemy's property, and to legitimate operations of attack and defense conformable to the usages of war and those which unforeseen necessities may require.

#### DIPLOMATIC RELATIONS

**1436.** Once war has broken out, diplomatic relations between the belligerent states are severed.

The diplomatic representatives will be recalled by their respective governments or they may be dismissed by handing them their passports and granting them sufficient time to leave the country with the privileges and guaranties which are due them according to international law.

If they should not leave within the time granted, the Government may compel their departure by having them conducted to the frontier.

**1437.** The belligerent government ought not to withdraw the *exequatur* from all the consuls of the enemy state, but should maintain it in force with respect to those who do not take undue advantage of their situation and who continue to exercise their legitimate functions. It may, however, withdraw the *exequatur* from consuls whose attitude is open to suspicion, and especially from those who, as citizens of the hostile state, may naturally take undue advantage of their position.

Since war does not interrupt all commercial intercourse and relations between private citizens of the belligerent states, the presence and functions of consuls are not, in principle, necessarily inconsistent with a state of war. The dismissal of all the consuls who exercise their functions in a hostile country would not, therefore, as a general rule be justified. It is preferable that governments should act with caution and should not withdraw the *ezequatur* except as to such consuls as may be suspected of taking undue advantage of their position in order to promote the interests of the belligerent state to which they belong.

At any rate, the government of a belligerent state should never be denied the privilege of entrusting to the representations of a neutral and friendly Power the protection of its nationals in an enemy state.

#### TREATIES

**1438.** The extinction of all treaties and conventions concluded between the belligerent states cannot be deemed an immediate effect of war, but only the termination of those which, by their nature and object, are necessarily inconsistent with a state of war.

Even though the execution or performance of a treaty must be regarded as suspended during the state of war by reason of its incompatibility with that condition of affairs or because of the obstacles created by hostilities, that circumstance cannot annul the legal force of the conventional obligations assumed by the belligerent states. These obligations again become valid and operative at the end of the war, unless the terms of peace modify the conventional relations previously established.

Several writers (Cf. Phillimore, v. 3, § 530; Twiss, v. 1, § 252; Calvo, 4th ed., § 362) have held that treaties concluded between states were automatically terminated whenever war broke out between them; but this theory does not seem to us justifiable. (Cf. rules 845 and 859.)

War does not place the combatants in the status of the so-called "state of nature" and does not destroy the authority of international and of conventional law so far as they are concerned. To be sure, war constitutes in itself a case of *force majeure* with respect to the exercise of any right which may be exercised and enjoyed only during peace. Yet, since war, considered as *ultima ratio*, must tend to restore the authority and respect of violated right, it is decidedly illogical to admit that it may destroy, with respect to belligerents, pre-existing rights, whether those rights arise out of custom or treaties. It is very likely that the state of war, while it lasts, may render impossible the execution of treaties, and it must be admitted that performance must be suspended while the impossibility lasts. But this suspension of treaties cannot bar those acts whose execution is compatible with the state of war; e. g., treaties concerning the execution of judgments of the respective courts, artistic and literary copyright and trade-mark treaties, those governing succession and bankruptcy, treaties of residence and travel, etc.

We persist, therefore, in maintaining that war does not in general destroy



the legal force of the conventional relations previously established between the belligerent states, but that legal rights and obligations based upon previous treaties recover their value when war has ceased, unless the treaty of peace shall otherwise provide. Cf. Bluntschli, *Le droit international codifié*, 3d ed. (transl. by Lardy), rule 538; Oppenheim, *op. cit.*, v. II, § 99; Bonfilis-Fauchille, § 1049; Pradier-Fodéré, v. VI, § 2704.

**1439.** All treaties, either general or special, concluded by states with a view to conditions of war, become operative from the time war is declared.

This is illustrated by the Paris Convention of 1856 concerning maritime war; by the conventions concluded at The Hague in 1907, relating to rights and duties of nations in time of war; and by the conventional provisions relating to contraband of war, embargo, etc.

#### MILITARY POWER—MARTIAL LAW

**1440.** One of the effects of war is to bestow extraordinary powers upon the commanding officers of the army and navy, both as regards combatants and non-combatants who happen to be in the war areas.

The commanding officer has the right to authorize whatever measures he may deem necessary to assure the success of the military operations, and to provide for urgent necessities through proclamation, even to the extent of proclaiming martial law.

**1441.** The proclamation and application of martial law cannot take place except at the time when enemy territory is seized and occupied.

With respect to the extent of the powers based upon martial law, see hereafter the rules relating to military occupation.

**1442.** Every military commander, in exercising the extraordinary powers which attach to his position in time of war must, however, refrain from violating the principles of natural justice, and must not disregard, in an arbitrary manner and without good reasons, the fundamental rights of persons and the guaranties which are vouchsafed to them by international law.

While the eventual necessities of war may, in principle, occasionally justify derogations from the "common" law, nevertheless it is inadmissible that any arbitrary wish or order of a military commander should supersede the law. When exaggeration and abuse are clear in the circumstances, the extraordinary powers of the commander cannot justify his usurpation of authority.

## MUNICIPAL LEGISLATION IN TIME OF WAR

**1443.** War at once brings into operation that part of municipal legislation which, in practically every country, governs the state of war, and maintains it in force until peace is concluded.

War is an exceptional state of affairs which, so far as the exercise of rights is concerned, constitutes *force majeure*. Therefore, during its continuance, the legislator must, by means of exceptional provisions, regulate the enjoyment and exercise of rights, and indicate the changes in public law which the exigency of war may require. Thus, in most if not all countries there exist exceptional provisions in the Civil Code concerning the forms of wills in time of war; in the Commercial Code, as regards the time periods for the bringing of an action of guaranty against the joint debtors under a bill of exchange; in the Merchant Marine Code, concerning goods which constitute contraband of war.

The Military Criminal Code is divided into two parts,—one in force in time of peace, the other in force in time of war. By the legislation of some countries, the principal change which public law may undergo in time of war arises from the possibility of proclaiming *martial law*. For example, this is expressly provided by the French law of April 3, 1898. That is one of the reasons why it is necessary to establish precisely when peace ends and war begins; hence the absolute necessity of a formal declaration of war.

## EFFECTS OF WAR ON PERSONS AND THEIR PROPERTY

**1444.** As a general effect of war, the citizens of the belligerent states or those of neutral countries who take part in the war operations are subject, as such, to the laws of war, which limit the free enjoyment of rights, so long as the necessities of war and the duties of neutrality may so require. Members of the army or the navy, or those who in any way participate in the armed struggle must be regarded as enemies. Private citizens of either of the belligerent states who do not take any effective part in the war, must be protected in the respective territories of those states in their personal security, the inviolability of their property, and the exercise and enjoyment of their private rights.

Modern law is opposed to the old idea or theory which regarded all of the nationals of the belligerent states as enemies. At present, only the individuals who actively participate in the struggle are considered enemies. This proper conception was formulated as follows in the remarkable speech made by Portalis in Year VIII, on opening the Council of Prizes:

"Between two or more belligerent nations, the individuals of which these nations are composed are enemies only by accident; they are not enemies even as citizens, they are enemies as soldiers only."

[This principle was in fact enunciated by Rousseau in his *Contrat Social* and was quoted by Portalis and others after him with unreflecting commendation. Anglo-American courts of law have adopted an entirely different view,

whatever philosophical justification may be found in Rousseau's doctrine. The matter is accurately analyzed by Westlake, *International Law*, II, p. 37—Transl.]

**1445.** A belligerent may subject those who are in the area of war and who do not take an active part in the hostilities to the orders of the military authorities and punish them for non-compliance therewith. He may also impose limitations upon them in the exercise and enjoyment of their rights, which may be justified by the exigencies of war. He may also subject their property to the necessities of war upon taking possession of the enemy's territory, yet without violating the laws and usages of war or the rules set forth below.

See hereinafter the rules concerning the rights of belligerents over the property of citizens of the enemy state in time of war.

**1446.** A belligerent state has no right to prevent the citizens of the hostile state from continuing to reside on its territory and to pursue their peaceful vocations, trade and commerce. Such obligation, however, would no longer exist if their conduct gives rise to well-founded suspicions that, for the purpose of war, they were aiding or favoring the government of the country of which they were citizens.

**1447.** It must be deemed contrary to the just principles of modern law to order the expulsion *en masse* of all the citizens of a hostile state who conduct themselves peacefully and do not commit any violation of law.

Even when the expulsion of some of them might be justified by their suspicious conduct, it ought to be considered contrary to natural justice to refuse them a reasonable time for settling their affairs before their enforced departure.

During the war of 1877, between Russia and Turkey, the Emperor of Russia authorized Turkish citizens residing in Russia to continue to live there and to exercise their peaceful callings under the protection of Russian laws. During the Russo-Japanese war, only the Japanese living in the oriental provinces were expelled, those living in the other provinces of the Russian Empire being permitted to continue their peaceful residence therein.

In many treaties of commerce and residence there is stipulated a time limit granted to merchants, in the event of war breaking out between the contracting states, for settling their affairs and placing their merchandise in safety before their departure. This clause, generally accepted, should henceforth be regarded as a rule of "common" law and respected as such.

At any rate, it would be unfair for a government to order the immediate departure of private citizens of the enemy state without granting them a

reasonable time in which to settle their affairs (three months at least). If the correct conception of Portalis (note under rule 1444) is borne in mind, that private citizens of the belligerent states are not at war with one another, the most natural and equitable rule consists in respecting the peaceful relations existing between the citizens of the contending governments notwithstanding the state of war. Such a course appears all the more reasonable when it is considered that the adoption of the opposite rule cannot be of any practical value to the belligerent states.

**1448.** It should be regarded as an act clearly contravening the principles of modern law to confiscate the property of private citizens of an enemy state who were residing in the state before the declaration of war, and especially to seize by embargo and to confiscate the merchant ships belonging to citizens of the other belligerent, before the declaration of war. Such a course would manifestly constitute a most serious violation of private property and would be an unwarranted impeachment of the good faith of peaceful merchants.

Confiscating enemy merchant ships subjected to embargo before the declaration of war cannot be justified under any circumstance, not even as an act of reprisal. How, in effect, could the legal character of an act accomplished in time of peace be perverted in order to subject it to the laws of war?

Honesty, good faith and respect for the principles of natural justice require that merchants who have entered foreign ports for the purpose of transacting business under the protection of the law of peace, should, in the event that war breaks out, have a reasonable time limit in which to complete their business and seek safety before being subjected to the laws of war.

**1449.** Temporary sequestration of enemy merchant ships in the ports of the other state at or near the time of the declaration of war, may be justifiable as a reasonable police measure when its object is to prevent divulgence by such detained vessels of the facts and circumstances relating to the preparations for or operations of war which it is necessary to keep secret. However, this measure, required for the safety of the state must, so far as its duration is concerned, be limited to the object it has in view.

**1450.** The states which signed the Convention of October 18, 1907, must be deemed bound to observe the provisions of that Convention with respect to merchant ships in their ports when hostilities begin.

The other states which did not sign it must, nevertheless, consider the rules it contains as the expression of the best principles of modern international law.

The Convention relating to the treatment of the merchant ships of a hostile state is the sixth of the Final Act of The Hague Conference; it bears the date

of October 18, 1907, but was in reality signed June 30, 1908. Germany and Russia made certain reservations.

The convention contains the following provisions:

*Art 1.—When a merchant ship belonging to one of the belligerent powers is, at the commencement of hostilities, in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.*

*The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.*

*Art 2.—A merchant ship unable, owing to circumstances of force majeure, to leave the enemy port within the period contemplated in the above article or which was not allowed to leave, cannot be confiscated.*

*The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.*

*Art. 3.—Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities cannot be confiscated. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the security of the ship's papers.*

*After touching at a port in their own country or at a neutral port, these ships are subject to the laws and customs of maritime war.*

*Art. 4.—Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.*

*The same rule applies in the case of cargo on board the vessels referred to in Article 3.*

*Art. 5.—The present Convention does not affect merchant ships whose build shows that they are intended for conversion into war ships.*

*Art. 6.—The provisions of the present convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.*

#### GENERAL RULES CONCERNING THE EXERCISE OF THE RIGHTS OF WAR

**1451.** It is the duty of every civilized state, aside from the obligations expressly undertaken in an international convention concluded on the subject, to exercise the rights of war according to the rational principles of international law, the laws of humanity and the requirements of civilization.

For this purpose, every government must draft suitable regulations and instructions calculated to prevent any arbitrary act on the part of the military authorities; to prevent, so far as possible, the excesses and violence not justified by the exigency of war; to

regulate the behavior of the army and navy in their relations with the belligerents of the hostile state and with the peaceful population, in order to restrict within just limits the disastrous consequences and unavoidable evils incident to war, and likewise to protect the rights of man, the laws of humanity and the requirements of civilization.

**1452.** Every government which has failed so to provide, by promulgating and making compulsory army and navy regulations and instructions to that end, or which, having provided therefor, has shown culpable neglect by failing to take the measures necessary for assuring the execution of the said regulations and instructions, or which fails to punish those who have violated the laws and usages of war declared compulsory, shall be deemed legally liable in damages. Such fact shall give rise to the international responsibility of the state for any damage arising from offenses or atrocities committed by its army or navy in violation of the laws and usages of war declared compulsory.

Several governments have, in fact, and aside from any engagement imposed by an international convention, drawn up regulations and instructions for their troops in time of war and have made them compulsory by law or decree. This is what the United States government has done.

The instructions for the government of the armies of the United States in the field were drawn up by Professor Lieber, author of the draft, which was later revised by a committee of officers. They were ratified by President Lincoln in 1863, and are the most complete in existence.

In like manner, Italy, in a spirit as usual fair and liberal, promulgated by a decree of November 2, 1882, the regulations for the service of the army in time of war, amended later by the decree of September 16, 1896.

In France the provisional regulations for the troops in the field were approved by decree of October 11, 1809, dated from Schoenbrunn; they were followed by other provisional instructions in 1823; and finally the army service was regulated by the presidential decree of October 28, 1883.

Germany proclaimed its last regulations for the service in time of war under date of January 1, 1900.

The first attempt toward rendering compulsory any international regulations concerning the laws and customs of war on the European continent was initiated by the Russian government, which prepared a draft agreement to determine the rights and duties of belligerent states and summoned the meeting of a Conference. This Conference met at Brussels on July 27, 1874, discussed the draft, amended it materially on various points, and drew up a new draft which was submitted to the approval of governments. It was not finally approved. The first Peace Conference of 1899, guided by the draft convention of the Brussels Conference of 1874, regulated certain matters relating to the exercise of the right of war. The Second Peace Conference of 1907 devoted its attention to the same question; the fourth convention of the General Act relates specifically to the regulation of war and makes the provisions

relating to the laws and customs of war, as adopted, compulsory upon the signatory states.

**1453.** All the states of the international society which have signed the conventions relating to the laws and customs of war concluded at The Hague on July 29, 1899, and October 18, 1907, must under these Conventions be deemed bound to observe the provisions agreed upon as compulsory in land warfare, provided they have been ratified.

**1454.** It is the duty of every one of the states which has signed and ratified the Convention of October 18, 1907, and of all the states which have adhered thereto, to give to their land forces instructions in accordance with the regulations concerning the laws and customs of continental war annexed to the said Convention and which are to be regarded as compulsory and applicable between the contracting parties should war break out between them.

Cf. articles 1 and 2 of the Convention under rule 1456.

**1455.** The laws and customs of war declared obligatory in continental war upon the states which have signed and ratified the General Act of The Hague Conference of October 18, 1907, must be considered under the guaranty and collective protection of the signatory states, like any other international engagement contracted in a general treaty.

Compare the declaration made at the London Conference, on January 17, 1871, Protocol No. 1, which reads as follows:

"The Plenipotentiaries convened in Conference recognize that it is an essential principle of international law that no power can free itself from the engagements of a treaty, or modify its stipulations except with the consent of the contracting parties through a friendly understanding."

[This was mere lip service to the principle of the sanctity of treaties. As a matter of fact, Russia had just then taken advantage of the Franco-German war of 1870 to denounce certain stipulations of the treaty of Paris of 1856. See Westlake, 2d ed., v. I, p. 297.—Transl.]

**1456.** Any state of the international society which may be at war with another member state or with one which has adhered to and ratified the aforesaid Convention, shall be held responsible for any violation of the provisions of the regulations, subscribed and ratified, committed on its own part or by persons constituting part of its armed forces; moreover, in proper cases, it shall be bound to make compensation for the damage so inflicted.

The rules that we propose are based on the Convention which is part of the General Act of The Hague of 1907, which amended that of July 29, 1899,

concerning the laws and customs of war. It is the fourth convention of the General Act and stipulates as follows:

ARTICLE 1.—*The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.*

ARTICLE 2.—*The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.*

ARTICLE 3.—*A belligerent party which violates the provisions of the said Regulations shall, if the case warrants, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.*

ARTICLE 4.—*The present Convention, duly ratified, shall as between Contracting Powers, be substituted for the Convention of the 29th July, 1864, respecting the laws and customs of war on land.*

*The Convention of 1864 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.*

1457. For the general purpose of restricting the evils and sufferings of war, it is incumbent upon the states constituting the international society to complete the codification of the laws and usages of land and maritime war and to sign and ratify the same. In this way, the conduct of belligerents in their relations with one another and with non-combatants would be governed by the principles of justice and humanity, and, as far as practicable, all arbitrary, unlawful or inhuman acts of the military authorities and combatants would be eliminated.

The regulations of the laws and usages of land war as stipulated by the Convention of 1907 are, on several points, quite satisfactory. They were the outcome of numerous studies on the subject made by those who drew up the instructions given to the armies of the civilized states, among which instructions special mention must be made of those given by the United States in 1863, by publicists, by the Brussels Conference of 1874, and by the Institute of International Law, which drafted a Regulation which was discussed and approved at the Oxford session of September 9, 1880.

The Conference of 1899 had already regulated certain points; but that of 1907, while revising the regulations of 1899, has introduced some noteworthy improvements in the codification of the laws and usages of land war. A fact of very great importance is that the convention was signed without reservation by the following thirty-eight (38) states:

Argentina	Denmark	Luxemburg	Roumania
Belgium	Dominican Republic	Mexico	Salvador
Bolivia	Ecuador	Netherlands	Servia
Brasil	France	Nicaragua	Siam
Bulgaria	Great Britain	Norway	Spain
Chile	Greece	Panama	Sweden
China	Guatemala	Paraguay,	Switzerland
Colombia	Haiti	Persia	United States
Cuba	Italy	Peru	Uruguay
		Portugal	Venezuela



It was signed with certain reservations by Austria-Hungary, Germany, Japan, Montenegro, Russia and Turkey.

We shall set out the articles of these regulations, studying each of the points to which they refer. It is to be hoped that this work will go on and that maritime war will be likewise regulated.

1458. So long as a complete code respecting the laws and usages of land and maritime war shall not have been issued, the states represented at the Conference of 1907 are bound to exercise the rights of war in cases not contemplated and regulated by the rules, in conformity with the principles of the law of nations, which are founded upon the usages established among civilized peoples, the laws of humanity and the dictates of public conscience.

This rule is based on the declaration made and signed without reservation by the forty-four states represented at the Conference of 1907, and which constitutes the preamble of the Convention respecting the laws and usages of land war, the fourth Convention of the General Act of October 18, 1907.

It reads:

*"The High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.*

*"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience."*

## TITLE VII

### EXERCISE OF THE RIGHTS OF WAR

#### BELLIGERENTS MAY EXERCISE THE RIGHTS OF WAR

**1459.** The exercise of the rights of war can lawfully appertain only to the persons who may be rightfully regarded as belligerents under the laws of war.

Any act of hostility, any armed violence against the person or property of the hostile sovereign or state and of its citizens, even though legitimate under the laws of war, shall be deemed unlawful and punishable according to "common" law, if committed by one who is not properly a belligerent.

Compare rules 1474 and 1477.

Considering the fundamental principle that war, according to modern law, is not an armed struggle between all the citizens of the belligerent states, but a struggle between the military forces of these states, it logically follows that only the individuals who belong to such forces are at all justified in committing acts of hostility.

#### WHO MUST BE DEEMED A BELLIGERENT

**1460.** All the individuals who constitute the regular military force in the service of the state, without distinction as between combatants and non-combatants, shall be regarded as belligerents.

**1461.** The military force comprises:

- (a) The regular army;
- (b) Any kind of militia organized in conformity with the military law (*territorial militia, landwehr, national or civic guard*);
- (c) Volunteer corps militarily organized with the approval of the government, having a responsible chief and under the supreme authority of the commander-in-chief;
- (d) The navy and merchant ships duly converted into ships of war, and privateers duly licensed. (Cf. rules 1613 *et seq.*)
- (e) The crews of ships of war and war craft.

**1462.** *The volunteer corps shall be deemed belligerents in war on land when they fulfill the following conditions:*

- (1) *To be commanded by a person responsible for his subordinates;*
- (2) *To have a fixed distinctive emblem recognizable at a distance;*
- (3) *To carry arms openly; and*
- (4) *To conduct their operations in accordance with the laws and customs of war.* (Art. 1 of the Regulations of October 18, 1907, of The Hague Conference.)

**1463.** *The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.*

Article 2 of the aforesaid regulations.

In the preceding editions, we have formulated this rule as follows:

"The inhabitants of a country not militarily occupied by the enemy, who, on his approach, without being militarily organized resist openly, with arms, to defend their country, and who, united, commit acts of hostility and exercise as best they can the right of legitimate defense, shall be likewise regarded as belligerents." (Rule 947, 1st edition (1890); rule 1163, 2d and 3d ed.)

We had not deemed it necessary that the population, prompted by the sentiment of defending their native soil against invaders, should be bound to comply with the laws and usages of war in order to be treated as belligerents. Should inhabitants who defend their country as best they can against a military attack or occupation come within the criminal law, without being able to invoke the protection of international law applicable in time of war?

#### REGULAR MILITIA, VOLUNTEERS, SAVAGES

**1464.** It is the duty of the governments of civilized states to provide by their laws for the organization of militia, so as to utilize all the fighting strength of their country and thus oppose the enemy with corps of troops militarily organized rather than rely upon volunteers.

**1465.** Every government shall have the right to employ volunteer corps, but shall not encourage irregular warfare by persons not accustomed to military discipline. It shall see that volunteer corps comply strictly with the laws of war and recognize the supreme authority of the commander-in-chief.

**1466.** No government of a civilized state shall have the right, even in case of necessity, to make use of the savages of its colonial

possessions, who wage war in their own way and are devoid of the sentiment of military honor and discipline like civilized peoples.

WHO CAN BE CONSIDERED A BELLIGERENT IN A CIVIL WAR

**1467.** A faction which conducts an armed struggle against the troops of the State in order to throw off the authority of the Government, or in the effort to secede and constitute an independent state, may be recognized as a belligerent when the following conditions are present:

(1) That the insurrection has broken out in a portion of the territory considerable in extent and the insurgents are sufficiently numerous and militarily organized as to offer serious resistance to the armed forces of the State;

(2) That the armed struggle, having regard to its duration, extent, political object, etc., assumes the character of war between the insurgent party and the State;

(3) That the insurgents succeed in establishing, somewhere in the territory of the State, a government which is so organized as to give the movement a unity of direction, and that they are directed and controlled by a commander-in-chief whom they obey and who is capable of assuming responsibility for their acts;

(4) That the insurgents respect the principles of international law and comply in their military operations with the laws and usages of war.

**1468.** Even though the insurgents may be recognized as belligerents by third Powers, that fact cannot prevent the regularly established government which they are opposing, from treating the leaders of the insurrection as rebels or as guilty of high treason.

**1469.** Every state which has recognized the insurgents as belligerents is bound to adhere to the laws and usages of war in its relations with them and with the Government they are opposing.

**1470.** When the State against which the insurrection is directed shall, of its own accord, recognize the latter as belligerents, their character as such must be regarded as established in their favor with respect to all third Powers, a fact which makes it possible for the insurgents to require from all parties the application of the laws of war and the recognition of the rights and duties arising out of a regular war between two independent states.

**1471.** Recognition as belligerents on the part of the regularly established Government cannot be regarded as equivalent to the recognition of their independence, but compels the State, in its relations with the combatant and non-combatant insurgents, to apply and observe in their entirety the laws of war.

#### VOLUNTEERS

**1472.** Volunteers and irregulars who, without the express authorization of the government of the belligerent state, participate in the war, can be regarded as belligerents and require the application of the laws of war under the following conditions:

- (1) That they be of a considerable number, militarily organized, and subject to the supreme authority of a commander-in-chief;
- (2) That they carry visible arms;
- (3) That they loyally fight for the principle which was the cause of the war;
- (4) That in their movements they conduct themselves as soldiers and observe the laws and usages of war like regular troops.

We believe that a distinction should be made between bodies of volunteers which take part in the military operations on request of the government or with its consent, and those which are occasionally formed in the course of the war, usually on the initiative of some leader, and composed of individuals who act on their own responsibility, being impelled and inspired by a full belief in the justice of the cause for which the war is waged. The former must be considered as an element of the military force of the State according to rule 1461c. The latter cannot be deemed to belong to the military force of the State. Therefore, in order that volunteers may be considered as soldiers, it should not be necessary to require the carrying of an exterior distinctive emblem recognizable at a distance. When fulfilling the conditions set forth in our rule, the belligerent ought not to be regarded as beyond the pale of international law.

Partisan war (guerilla) can really become unrestrained because it leaves the door open to individual initiative and can easily be transformed into a military venture for the advantage of partisans. The principal condition of the recognition of irregulars as belligerents ought to be loyalty, both in the manner of conducting engagements and in their military behavior, refraining from surprising the enemy by deceit. We acknowledge that in this respect much must be left to the prudent judgment of the commander-in-chief, but he must not exceed his powers. Thus, we think that the chief of the German army overstepped his authority during the war of 1870, when he promulgated the following proclamation:

"Every person arrested, who desires to be treated as a prisoner of war, will have to prove his character as a French soldier by exhibiting the order of the proper authority and proving that he was called to perform his military

service and that his name is entered on the matriculation book of a corps militarily organized by the French Government."

**1473.** In case the government calls for volunteers for the defense of the country, or in case of wholesale levies, all the citizens called to the colors and those who, on their own initiative, may have organized themselves into military corps, shall be treated as soldiers:

- (1) When they openly carry arms and perform acts of hostility without treachery or dishonesty;
- (2) When they are commanded by a responsible chief;
- (3) When their character as combatants is established by their organizations, movements and military conduct.

#### THOSE HAVING NO RIGHT TO BE CALLED BELLIGERENTS

**1474.** It is impossible to grant the exercise of rights of war to persons militarily organized, however considerable their number may be, when they make use of armed force to plunder or rob, or commit other acts contrary to international law.

**1475.** Armed bands committing hostile acts in time of war by engaging in operations on their own account and without authorization of the Government and, when necessary, concealing their identity as combatants, cannot invoke the application of the laws of war nor be recognized as belligerents. Acts of violence committed by them shall be regarded as crimes and subject, as such, to the application of the criminal law.

The armed bands which used to devastate Southern Italy, sacking private property, were militarily organized and had chiefs; by no means, however, could they rightfully be regarded as belligerents when they made use of their arms to violate the rights of private persons. Although composed of a considerable number of men, they were merely a band of marauders unworthy of being treated like enemies of the State; they could only be considered as criminals.

**1476.** The status of a belligerent may be refused to volunteer bodies undertaking a military expedition without authorization or tacit connivance of the Government, and committing acts of war, not in the interest of the State or for the triumph of an idea representing the sentiments of a considerable part of the people, but for the fulfillment, at their own risk, of a political object.

It is inadmissible that the status of a belligerent should be conferred upon every one undertaking a military expedition with a political object in view. The motive or purpose of certain undertakings will no doubt have to be considered before assigning to acts of violence the character of political offenses. Nevertheless, since the right to wage war is not a private right, it cannot be usurped by any given number of persons undertaking a military expedition.

**1477.** The status of a belligerent can be denied to any volunteer corps, even waging war in the interest of the State and militarily organized, when they not only fail to wear any fixed distinctive emblem recognizable at a distance, but moreover endeavor by deceit and artifice to conceal the fact that they are soldiers in order to wage an unfair war.

#### PERSONS ATTACHED TO THE SERVICE OF THE ARMY

**1478.** *The armed forces of the belligerent parties may consist of combatants and non-combatants.*

*In the case of capture by the enemy, both have a right to be treated as prisoners of war.*

Article 3 of the annex to The Hague Convention of October 18, 1907, 4th convention of the General Act.

**1479.** All persons attached to the service of troops, although not participating in the operations of war as combatants shall have the same status as belligerents and be subject to the laws of war.

The application of these laws shall be extended to persons who, although not among the combatants and not attached to the service of the army, are in the area of war for a purpose not inconsistent with the purpose of war.

**1480.** In like manner, the right to be regarded as belligerents may be claimed by all persons engaged as couriers, messengers or bearers of official dispatches, and by those charged with maintaining communications between the different divisions of the army or navy, in whatsoever manner they perform their respective duties; likewise by those who make use of balloons or similar contrivances, provided, however, they are not in a position to be considered as spies.

## TITLE VIII

### ACTS OF HOSTILITY IN WAR ON LAND

#### LAWFUL AND UNLAWFUL ACTS

**1481.** Belligerents have not an unlimited right with respect to the means to be employed to injure the enemy.

Article 22 of the Regulations respecting the laws and customs of war on land, annexed to the Convention of October 18, 1907, the 4th of the General Act of The Hague.

N. B.—These will always be cited as *The Hague Regulations*.

**1482.** Hostile acts calculated to attain the aims of war may be considered lawful if they weaken the enemy so as to compel him to capitulate, provided that such acts are not committed without necessity therefor and do not exceed the military object in view.

War must not tend to the extermination, destruction and annihilation of the enemy, but to his defeat in order to compel him to surrender.

Any hostile act not required by the object of war must be regarded as unjustifiable; any act exceeding the object in view is to be deemed contrary to the laws of humanity.

**1483.** Any hostile act shall be deemed unlawful which increases unnecessarily and without reason the sufferings of the enemy, as shall, also, any act which may be regarded as barbarous, cruel, unfair and treacherous.

**1484.** Any act of unnecessary destruction committed without an order of a superior authority shall be deemed unlawful, as well as acts of useless destruction authorized and ordered but which cannot be justified by the necessities of the defense, or which may be committed in excess of military needs.

The principles laid down in the preceding rules were solemnly recognized in the Convention signed at St. Petersburg on December 11, 1868, to which the majority of civilized states have adhered. It was concluded with the object of prohibiting the use, in time of war, of explosive projectiles weighing less than 400 grams or charged with inflammable or fulminating material. In the preamble to this Convention the just principles which must inspire hostile acts in wars between nations are clearly stated as follows:



"Whereas, the progress of civilization should, so far as possible, result in an attenuation of the horrors of war;

"Whereas, the sole legitimate aim which states ought to entertain during war is the weakening of the military forces of the enemy;

"Whereas, for this purpose, it is sufficient to place *hors de combat* the greatest possible number of men;

"Whereas, this object would be exceeded by the employment of arms which would uselessly aggravate the sufferings of men placed *hors de combat*, or would render their death inevitable;

"Whereas, the employment of such arms would therefore be contrary to the laws of humanity. . . ."

The military penal code of Italy (art. 252) provides the penalty of death by degradation for any person who, without superior orders and constraint impelled by the necessity of defense, shall set fire to a house or other building in the enemy's country.

#### ACTS PROHIBITED ACCORDING TO THE LAWS OF HONOR AND CUSTOMS OF WAR OF CIVILIZED STATES

**1485.** Besides the hostile acts contemplated in special conventions concluded between them, we should consider as absolutely prohibited in wars between civilized states, those acts which were specifically prohibited by the states represented at the Hague Conference of 1907, namely:

- (a) *To employ poison or poisoned weapons;*
- (b) *To kill or wound treacherously any individuals belonging to the hostile nation or army;*
- (c) *To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;*
- (d) *To declare that no quarter will be given;*
- (e) *To employ arms, projectiles, or materials calculated to cause unnecessary suffering;*
- (f) *To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;*
- (g) *To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;*
- (h) *To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.*

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent service before the commencement of the war.

Such is the text of article 23 of The Hague Regulations.

In rule 1214 of our 2d and 3d editions, sub-head (d), which we had advocated, was formulated as follows:

(c) Refusing quarter to a garrison, even if it should be done in execution of a previous declaration that no quarter would be given.

We thought, and we still think, that the unlawful act must consist in the refusal to give quarter, as the declaration might be made for the purpose of intimidation.

Sub-head (e) was thus formulated in the same rule 1214:

(e) The use, in the armed conflict, of projectiles and materials calculated to cause unnecessary damage and wounds painful and difficult to heal.

The subhead thus formulated seems to us more comprehensible and humanitarian.

**1486.** To massacre persons who surrender at discretion or a garrison offering to capitulate cannot be justified either on the ground of reprisals, or by reason of the difficulty of insuring the custody and providing for the maintenance of the prisoners of war thus placed in the power of the hostile army.

The right of life and death is the belligerent's as against the enemy who attacks him with arms and is committing hostile acts. Any killing inflicted while the fight is in progress may be justifiable, if its purpose is to paralyze the enemy's forces and thus induce the enemy to surrender. The combatant who does not resist, but surrenders unconditionally, ceases to be an enemy and can never be killed; his massacre could not be justified on the ground of the difficulty of caring for prisoners of war, or on the ground of retaliation for a similar massacre of prisoners of war by the opposing forces. Refusal to give quarter to a garrison which offers to surrender and the massacre of soldiers who have laid down their arms can never constitute legitimate warfare. Murdering a man is always a crime.

The Italian army regulations of the 26th of November, 1882, provide as follows:

"ART. 718.—Any act whatever of cruelty and barbarity is absolutely prohibited, and shall be severely punished. Respect and protection are due to the inhabitants remaining neutral, both in their persons and in their property.

"ART. 719.—Whoever abuses or despoils enemies unarmed, sick, wounded, or dead; whoever sets on fire, destroys or damages without necessity the property of others, is liable to the penalties provided by the Code."

These articles are reproduced verbatim in the regulations of September 16, 1896, at present in force.

#### RIGHTS WHILE ENGAGED IN FIGHTING

**1487.** A belligerent may attack, fire upon and kill any individual who takes an active part in the war, so long as he resists with arms or commits hostile acts.

**1488.** A belligerent has no right to direct his attack against

individuals who accompany the troops and take no active part in the fighting. Nevertheless, the killing of such persons in the heat of battle must be regarded as the consequence of the regular exercise of the rights of war.

RIGHTS OF PERSONS WHO FALL INTO THE POWER OF THE ENEMY

**1489.** Any man committing hostile acts by taking an active part in the war, and having the status of or assimilated to a belligerent (*cf.* rules 1455 *et seq.*) shall be treated as a prisoner of war provided he has laid down his arms, or offered to surrender, or otherwise shall have fallen into the power of the enemy.

The same right appertains to individuals belonging to a troop or to a garrison which shall have collectively capitulated or surrendered unconditionally.

**1490.** The fact that a commander or army chief should declare his unwillingness to recognize as belligerents those who are properly entitled to claim that status, could not legally justify his refusal to apply the laws of war to persons who have fallen into his power, or deprive them of the rights which, by customary international law, they may properly claim as prisoners of war.

**1491.** Belligerents must not exercise the rights of war against wounded enemies who are in military hospitals or ambulances for the purpose of receiving the necessary care and treatment, but must observe the rules stipulated in the Geneva Convention of August 22, 1864, concerning the care of the sick and wounded in time of war.

SPIES <sup>1</sup>

**1492.** Any person, whether belonging to the enemy's army or not, who clandestinely, secretly, under false pretenses or in disguise, enters the hostile lines and tries to procure information useful for military purposes shall be deemed a spy.

**1493.** A soldier not in disguise cannot be regarded as a spy even though he has secretly entered the zone of operations of the hostile army in order to secure information useful to combat the opposing forces. In like manner, a non-military person, charged with the

<sup>1</sup> We reproduce without change the rules laid down in the second, third and fourth editions of this work.

transmission of dispatches intended for the army of his country, who openly fulfills his mission, cannot be regarded as a spy.

**1494.** Neither are those persons to be regarded as spies who, as soldiers or civilians, have endeavored, by means of a balloon, to maintain communications between the various sections of an army or of a country, or who have approached the zone of operations of the hostile army for the purpose of obtaining useful information.

In the case of individuals who make use of a balloon in order to approach the enemy's camp or to obtain information, it cannot be held that they act clandestinely, under false pretenses or under disguise so as to be characterized as spies. The belligerent, no doubt, has the right to attack and kill them; but if they fall into the enemy's power, they will have to be treated as prisoners of war and not as spies, for they will have performed a legitimate act of warfare in thus openly attempting to get useful information.

**1495.** Municipal law may assimilate to espionage and punish as such, or even more severely, the crime of a citizen or of a foreigner residing in the territory of the state who shall impart information to the enemy or maintain relations with him for the purpose of communicating information useful for his operations; and whatever the nature of these facts and regardless of the severity of the punishment inflicted, the provisions of the local law as to jurisdiction, procedure and punishment may, without condition, be applied to any person residing within the state.

#### RIGHTS OF THE BELLIGERENTS RESPECTING SPIES

**1496.** It shall not be considered contrary to the usages of war nor to the military honor of the commander of an army to make use of secret agents or spies in order to obtain information which he may need.

**1497.** A belligerent has the right to inflict severe punishment, according to martial law, upon any person who may be considered a spy, provided that such person falls into his power while caught in the act of spying. The belligerent is bound, however, to remand the offender to a court which, under martial law, is competent to try and sentence him.

The rules concerning spies, established in common accord by the states represented at The Hague, are as follows (4th Convention, Annex):

**ART. 29.**—*A person can only be considered a spy when, acting clandestinely or under false pretenses, he obtains or endeavors to obtain information in the zone*

*of operations of a belligerent, with the intention of communicating it to the hostile party.*

*Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.*

ART. 30.—*A spy taken in the act shall not be punished without previous trial.*

ART. 31.—*A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.*

#### GUIDES

**1498.** A belligerent has no right to compel the citizens of the hostile country, who fall into his power, to act as guides for him or to impart to him the information he needs. He shall have the right, however, to punish those who knowingly have volunteered their services for the purpose of misleading him.

This rule may be considered as based upon the last paragraph of article 23 of The Hague Regulations, which formally forbids the belligerent to force the citizens of the hostile state to participate in the operations of war directed against their country. *Supra*, rule 1485.

**1499.** A belligerent state shall have the right to punish, as traitors to their country, such of its citizens as voluntarily shall have acted as guides to the enemy; but it would be unfair and unjust to punish those who, under duress of the enemy by force, violence or threat of death, have done that which, under the circumstances of the case, they were unable to refuse to do while in the enemy's power.

#### FLAGS OF TRUCE <sup>1</sup>

**1500.** A person is regarded as bearing a flag of truce if he has been authorized by the belligerent to enter into communication with the enemy and he appears as such for the purpose of treating and negotiating during the course of the hostilities, making himself known by means of a distinctive sign, a *white flag*, recognized under the usages of war.

<sup>1</sup> We reproduce the rules proposed in the second, third and fourth editions.

Persons who accompany him, such as flag-bearer, trumpeter or drummer, must be plainly identified with the flag of truce.

**1501.** The military commander of the enemy is not in all cases and under all circumstances obliged to receive the flag of truce, or to stop firing when the enemy sends it to him for the purpose of negotiating during the course of the hostilities. It is optional with him to decide whether or not the persons presenting the flag of truce shall be received.

**1502.** It is always contrary to military honor to fire at the bearer of a flag of truce approaching the zone of action, even when the commander is not inclined to receive him or later refuses to admit him.

If, however, the commander should refuse to receive the bearer of a flag of truce by expressly declaring his unwillingness to negotiate with the enemy's representative within a certain time, and if, after such refusal and due notice, the flag of truce should again be presented, its bearer could be treated as an enemy who, in bad faith, attempts to approach the lines of the other belligerent.

**1503.** A commander consenting to receive a flag of truce may take all precautionary steps that he may deem necessary to prevent the flag-bearer from taking advantage of his stay in the lines, even to the extent of temporarily detaining the envoy if, in the opinion of the commander, he was able, even involuntarily and in good faith, to ascertain something which it would be to the commander's prejudice to have the enemy know.

**1504.** The bearer of a flag of truce who should fail to respect the conditions imposed for its reception or who, taking undue advantage of his position, should surreptitiously procure or attempt to procure information, would thereby lose all right of immunity and could be declared a prisoner of war. Indeed, if it should clearly appear from the circumstances that the envoy has taken undue advantage of his position and committed an act of treachery, he could be regarded as a spy and summarily punished as such.

**1505.** The bearer of a flag of truce should always carry out his mission scrupulously and honestly. It shall be deemed absolutely contrary to military honor to take improper advantage of his privileged position.

The rules respecting flags of truce adopted by the states represented at The Hague are as follows:

ART. 32.—*A person is regarded as bearing a flag of truce who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.*

ART. 33.—*The commander to whom a flag of truce is sent is not in all cases obliged to receive it.*

*He may take all the necessary steps to prevent the envoy taking advantage of his mission to obtain information.*

*In case of abuse, he has the right to detain the envoy temporarily.*

ART. 34.—*The envoy loses his right of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treachery.*

#### RIGHTS OF THE BELLIGERENTS AGAINST PERSONS NOT OF THE ARMY

**1506.** Persons and bands who, while not belonging to the army and not meeting the conditions required to be considered as belligerents, accomplish during the war acts of hostility, undertake marauding expeditions, destroy property, or maltreat the enemy's soldiers, have no right whatever to be treated as public enemies, and cannot invoke the application of the laws governing combatants. If they fall into the power of either belligerent, they are subject to the criminal laws and may be punished as felons, plunderers or pirates, and cannot claim any of the privileges of prisoners of war.

**1507.** All nationals of the hostile state, who cannot be deemed public enemies and do not commit acts of hostility, must be considered as peaceful citizens and can, during the war, continue freely to exercise their rights and enjoy their property under the protection of international law.

The belligerents are not permitted to apply the laws of war to or treat as enemies the citizens of the opposing state who are in their country, or even in the zone of military operations, when they do not take any direct or indirect part in the war, but continue to carry on their ordinary callings as in time of peace.

#### JOURNALISTS AND CORRESPONDENTS

**1508.** No journalist or newspaper correspondent can be permitted to follow armies without special authorization of the com-

mander-in-chief, who may prescribe such conditions and regulations in the case as he may deem necessary.

**1509.** The commander of the belligerent army may enforce any measures that he may deem necessary to control the news service of journalists, for the purpose of preventing them, through lack of discretion, from jeopardizing the success of the military operations and movements.

**1510.** Any person wishing to avail himself of this authorization to follow the belligerent armies, must state his name and that of the newspaper or news agency he represents, and give his word of honor that he will send out communications only in strict compliance with the conditions imposed by the commander-in-chief.

Any violation of the regulations prescribed will justify the withdrawal of the authorization and even, under certain circumstances, the imprisonment of the journalist or correspondent for such length of time as the commander may deem adequate, and during such imprisonment the journalist or correspondent shall be treated as a prisoner of war.

**1511.** As a rule, ciphered correspondence, as well as direct and uncontrolled correspondence, shall be considered prohibited, in case the commander shall have subjected such correspondence to the previous revision of an officer entrusted with power to censor or revise all communications liable to jeopardize military interests.

**1512.** Any newspaper correspondent may be punished, if it is proved that he is spreading false news or is taking advantage of the authorization he has obtained, by publishing in the press information gained and communicated without previously submitting it to the approval of the official censor.

He may even be treated as a spy, if it appears from the circumstances that, under the guise of a newspaper correspondent, he has endeavored clandestinely to obtain news and information for the purpose of favoring the military operations of the enemy, and has divulged information thus obtained.



## DESERTERS

**1513.** Each commander of the belligerent armies shall have the right, without violating the law of military honor, to welcome enemy deserters.

It would, however, be contrary to the laws of honor to resort to corruption, dishonest actions and immoral means for the purpose of inciting desertion and rebellion. The use of such means ought to constitute a criminal offense.

**1514.** Each commander of the hostile armies may apply the laws against deserters to those who, after desertion, enter the service of the enemy and are later captured in the course of the operations of war, even though, when captured, they constitute part of a body of the enemy which surrendered and had the right to demand the application of the laws governing prisoners of war.

## TITLE IX

### MILITARY OPERATIONS DURING WAR ON LAND

#### LAWFUL MEANS OF ATTACK AND DEFENSE

**1515.** Belligerents may resort to all means of attack or defense which, according to military science, may be deemed effective for the purpose of weakening, paralyzing or destroying the enemy's military forces.

They may undertake any military operation calculated to attain the object of war so as to compel the enemy to acknowledge his defeat.

#### SIEGE <sup>1</sup>

**1516.** It shall be deemed lawful in time of war to lay siege to any fortified position, or to any position whatever, if it offers resistance, for the purpose of cutting off all communications and of forcing its defenders to surrender through dire want of food, ammunition or other needful supplies.

**1517.** Investment of a place executed by means of a siege or blockade is regarded as a lawful means of attack between belligerents, even when resorted to for the purpose of occupying an unfortified position, whether the resistance comes from the troops or from the inhabitants.

**1518.** The siege must be effective. It will be regarded as such when the place is invested by the establishment around it of a cordon of troops and by the occupation of positions calculated to prevent any communication.

**1519.** A commander wishing to lay siege to a fortress or to a city must make his intention known through a public proclamation. Once this formality has been observed, any act of private persons, accomplished with a view to maintaining communica-

<sup>1</sup> We reproduce the rules proposed in the second, third and fourth editions respecting siege and bombardment.

tions with the besieged city or fortress and especially for the purpose of supplying the inhabitants with food and supplies designed to prolong their resistance, shall be regarded as an act of hostility.

#### RIGHTS RESPECTING PERSONS IN CASE OF SIEGE

**1520.** The commanders of besieged fortresses must exercise their powers in conformity with the military law of their country and provide for the necessities of defense and resistance. It shall be deemed one of their rights to order all the inhabitants who happen to be in the stronghold and have not sufficient means of subsistence, to leave it before the siege begins. These commanders shall even have the right to resort to force to compel such inhabitants to leave, and also the right to expel, without any formality, all foreigners and suspected persons.

**1521.** After the proclamation of the siege and the investment of the place, it shall be deemed contrary to the laws of war to order the departure of peaceful citizens who happen to be in the besieged place.

**1522.** The commander of the army which is preparing for the siege shall have no right to prevent peaceful citizens desirous of leaving the besieged place or who, in anticipation of the siege, may have been expelled by the enemy commander, from freely departing from the zone of military operations. But if, after the siege has been declared and effected, the commander of the place, in order to prolong resistance and reduce the consumption of the limited supply of stores, has compelled all persons not engaged in defending the garrison to leave the city, it would be proper for the commander of the besieging army to make use of the least rigorous means to force the expelled persons to re-enter the besieged place and thereby curtail resistance.

In such a case, it should be considered an act contrary to the laws of war for the commander of the besieged place to refuse to the peaceful inhabitants expelled the privilege of re-entering the city, thus exposing them to serious and inevitable dangers.

**1523.** Should hostile prisoners of war happen to be in the besieged place, the commander would have the absolute right of expelling them even after the siege had commenced, if he deemed such action in the interest of prolonged resistance.

## BOMBARDMENT

**1524.** Bombardment may be resorted to only in time of war as a direct means of obtaining the surrender of a fortress or of a fortified place, or as an auxiliary means in the operation of a blockade or siege.

This method of attack shall not be permitted against cities or thickly populated communities which are not defended and fortified.

Notifying a bombardment, in the case contemplated in the second part of the rule, must be deemed an obligatory formality indispensable for allowing peaceful citizens to provide, so far as possible, for the protection of their persons and property. It may also be considered as an effective measure toward coercing the commander to surrender, in order not to expose the lives and property of peaceful citizens to grave and inevitable dangers.

**1525.** The commander shall have the right to lay siege to and bombard, without formality, an isolated fortress which is defended by the enemy; but if such fortress is attached to a city or a place inhabited by a considerable number of peaceful citizens, he shall be obliged, before commencing the bombardment, to give notice thereof to the hostile authorities, so as to restrict this means of attack to the object in view.

**1526.** Reasonable precautions shall be taken to direct the bombardment against fortified points and, so far as practicable, toward sparing private property, public buildings dedicated to charitable purposes, science and religion, and military hospitals, provided always that these buildings are not at the same time being used for military purposes.

The Italian army regulations of 1882, provide as follows:

"ART. 705.—The use of arms is prohibited against enemy hospitals and ambulances and against the personnel thereof, whenever they are performing their special duties and bear the distinctive emblems established by the Geneva Convention. (For hospitals and ambulances, *white flag with red cross*, for the personnel, *white brassard with red cross*.)

**1527.** The throwing of explosives and incendiary projectiles with a view to destroying the houses of the inhabitants and commercial establishments shall not in any case be considered as a lawful war operation, even if it should be done with the purpose of terrorizing the inhabitants and inducing surrender of the place.

**1528.** The commander of a fortress or besieged city must indicate the presence of public buildings which are not employed

for the purposes of defense, by means of plainly visible signs, which signs must be made known to the besieger.

Moreover, it is always to be considered contrary to the laws of war and to military honor in any way to employ, for purposes of defense, any buildings which have been pointed out as being devoted to pacific use.

**1529.** Bombardment of a closed and defended city shall be deemed an unfair means of attack, when practiced for the sole purpose of causing damage and intimidating the inhabitants and not for the direct purpose of compelling the enemy to surrender. This should be true especially when the occupation of the defended locality cannot have a serious influence on the ultimate issue of the war, and when circumstances clearly indicate that the belligerent has merely utilized the defense of the city as a pretext to bombard it and thus injure and terrify the peaceful citizens therein.

We have reproduced without change the rules proposed in our first three editions.

Those of The Hague Regulations respecting bombardment are as follows:

**ART. 25.**—*The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.*

**ART. 26.**—*The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.*

**ART. 27.**—*In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided that they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.*

#### DESTRUCTION AND FIRE

**1530.** It shall be permissible to devastate the property of the enemy, to set on fire and voluntarily destroy his buildings and things appurtenant thereto, whenever this may be necessary in order to attain the objects of war; but devastation and wanton destruction for the sole purpose of vengeance must be regarded as unlawful and contrary to the laws of war.

It shall likewise be permissible to devastate and destroy private property; but only when such action may be considered as required by the actual necessities of war and military operations.

**1531.** In no case must the acts of destruction often imposed

by the necessities of war and of military operations exceed, without reason, the object intended to be attained.

**1532.** It shall be considered barbarous to destroy commercial ports, public buildings dedicated to peaceful use, objects of science and art and collections which are in private and public buildings, even when the belligerent has taken possession of a city by assault, siege, or bombardment.

**1533.** Commanders of armies must forbid and prevent any unjustified act of barbarism and punish soldiers who, without military necessity, set on fire, destroy or damage the dwellings of private citizens of enemy nationality.

**1534.** It is the duty of governments to determine by law, which acts directed against enemy property shall be deemed crimes in time of war, and to provide for the punishment of those acts.

#### SACKING OR PILLAGE

**1535.** It shall always be deemed unlawful to authorize the pillage or sacking of towns taken by assault, and as contrary to military honor to encourage pillage and not to do everything possible to prevent it.

**1536.** It shall not be regarded as pillage for soldiers, upon entering a hostile country following an assault or a battle, to take, without further formality, whatever they may need for their urgent and immediate necessities.

The Italian legislation declares pillage absolutely unlawful and punishes the offender. Article 275, of the Military Criminal Code of Italy, provides in effect as follows:

"Pillage is prohibited. The person who has ordered it or who, without order, shall be guilty of it, shall be punished with death."

The Hague Regulations contain the following rule:

ART. 28.—*The pillage of a town or place, even when taken by assault, is prohibited.*

#### STRATAGEMS AND TRICKS

**1537.** It shall be deemed permissible to combat the enemy by means of stratagems and tricks, provided, however, that these acts do not imply the violation of an engagement assumed or of the laws of war and imply neither faithlessness nor treachery.

**1538.** It shall be deemed strictly prohibited even for the purpose of stratagem, to make wrongful use:

- (a) Of a flag of truce;
- (b) Of the distinctive signs prescribed under the Geneva Convention to protect certain places and persons from the laws of war. (Cf. rule 1609 and the note under rule 1610.)
- (c) Of the flag, insignia, and uniform of the enemy;
- (d) Of the distinctive signs used for places dedicated to peaceful objects in case of bombardment. (Cf. rule 1528.)

Recourse to such means for the purpose of misleading the enemy shall always be regarded as contrary to the laws of war and shall in no case be justified by the pretext of stratagem.

**1539.** Whoever, unfairly and in bad faith, shall make use of one of these means to deceive the enemy in the course of hostilities, cannot invoke the protection of the laws of war if he should subsequently fall into his power.

The Italian army regulations of November 26, 1882 and September 16, 1896, contain the following provision:

**ART. 701.**—There is no disgrace in losing a flag when it is defended to the last extremity; it is, on the contrary, a disgraceful action to save it by hiding it, with a few men as protection, from the enemy's sword and fire.

#### MILITARY OCCUPATION <sup>1</sup>

**1540.** Military occupation is a legitimate war operation. It may be considered as having taken place when a belligerent has entered into possession of a more or less extensive portion of the enemy's territory and has thus placed himself in a position of actually exercising sovereign authority therein.

Military occupation, properly speaking, is neither invasion nor conquest. Invasion is a war operation of a belligerent who, after having taken a portion of the enemy's territory by assault, takes advantage of the positions occupied by him for the necessities of war, by applying military law to the hostile country while there, making requisitions and imposing war contributions. Invasion also gives to the belligerent certain rights to the territory taken. No doubt the belligerent can take advantage of the conquered position and pursue such course as may be necessary to retain possession thereof. Nevertheless, so long as the struggle is proceeding with doubtful success and the belligerent has displayed no intention to settle on the conquered territory, notwithstanding the fact that the sovereign power of the invaded territory has been supplanted by that of the conquering belligerent, it cannot be said that military occupation, properly speaking, has taken place.

<sup>1</sup> We reprint here all the rules respecting military occupation as they are formulated in our 2d, 3d and 4th editions.

## HOW OCCUPATION BECOMES EFFECTIVE

**1541.** Military occupation shall not be deemed effective so long as the struggle continues against the inhabitants of the invaded country, and so long as they shall not have ceased legitimate acts of hostility in their efforts to defend it.

**1542.** Military occupation shall be regarded as effected by the fact of taking possession of the hostile country by an occupying army corps. It does not matter how the complete subjection of the territory occupied was secured whether as a result of capitulation or of the inability of the inhabitants to continue fighting, thereby necessitating their submission to and recognition of hostile authority.

## IMMEDIATE CONSEQUENCES OF MILITARY OCCUPATION

**1543.** An effected occupation involves the actual submission of the inhabitants of the occupied country to the authority of the occupant, and the incidental obligation on the part of said inhabitants to recognize that their government, as constituted before it fell into the power of the victor, is no longer qualified to exercise public functions.

**1544.** The obligation imposed on the inhabitants of the occupied country of considering their relations with the defeated sovereign as temporarily suspended, and of recognizing the victor's authority established in fact over all the territories militarily occupied, must be considered as effective, independently of the victor's intention to retain possession for a longer or shorter time of the occupied territory.

**1545.** The occupying military authority shall take all necessary steps to preserve order and exercise sovereign power in the occupied territory, so as to insure the respect of persons and property as well as the regular exercise and protection of all their legal rights.

**1546.** Military authorities shall have the right to avail themselves of all possible advantages of the occupation, but shall be bound to exercise the rights and duties of sovereignty within reasonable limits, taking into account the necessities of war and the very nature of military occupation.



In principle, military occupation deprives the enemy of the possession of the occupied territory and substitutes therein the victor's exercise of the rights of sovereignty. Yet, as this fact is subject to the eventualities of war and can only become final through a treaty of peace and the cession of the territory in question, the occupying sovereign must exercise his powers only within the limits of actual necessity. Therefore, he shall have the right to do what is at the moment essential to maintain himself in possession of the occupied territory, to prevent and punish any attempt to hinder his government, to compel the inhabitants to obey him and to insure public order. But he would overstep the just limits imposed by the nature of his authority if he should assume to act as if he possessed absolute sovereignty over the occupied territory, e. g., if he should treat the inhabitants as his subjects, and consider occupation during war as a definitive conquest.

#### RIGHTS OF THE OCCUPANT RESPECTING PERSONS

1547. The occupant shall have the right to force all the inhabitants to obey him, to compel them to recognize the *status quo*, and to consider their relations of loyalty and subjection to the defeated sovereign as temporarily suspended; but he shall not have the right to compel them to adopt an attitude of enmity toward their former sovereign, nor shall he construe any sentiment of patriotism on their part as an offense.

Cf. the last paragraph of article 23 of The Hague Regulations given under rule 1485.

1548. Any invasion of individual liberty, any act of servility imposed by force on the inhabitants of the occupied country, any punishment of patriotic sentiment which does not manifest itself in the form of hostile acts or demonstrations, shall be deemed contrary to the laws of war.

1549. It would be unfair and arbitrary to require the oath of allegiance of the judges and civil officials of the occupied country. The occupying authority may divest public officials of their offices and require of those who, owing to the necessities of the situation, must continue in the exercise of their duties, their word of honor that they will obey the government of occupation so long as the victor shall remain in control of the occupied territory.

To impose the oath of allegiance, properly speaking, upon persons who are compelled to submit to the necessities of war, while considering as still subsisting the bonds which unite them to their fatherland, would not only be a fallacious guaranty, but an act absolutely arbitrary and unfair on the part of the victor, who would thus impose on officials the violation of their political loyalty.

**1550.** It shall be considered as absolutely contrary to the laws of war and as a most grievous offense to compel the inhabitants of the occupied territory to perform military service or commit hostile acts against their country.

**1551.** The occupant shall have no right to forbid the inhabitants of the occupied country to leave it at will; neither shall he be permitted to consider the entire population as prisoners of war.

#### CIVIL OFFICIALS AND EMPLOYÉS

**1552.** Civil officials and employés of all kinds consenting to continue in the performance of their respective duties must enjoy the protection of the occupant. They shall always be subject to dismissal and shall have the right to resign their respective offices. They shall not be subject to disciplinary punishment except when they fail to perform obligations freely assumed, and shall only be liable to prosecution when they violate their duties.

ART. 45 of the Manual of the Institute of International Law, *Les lois de guerre sur terre* adopted at Oxford, 1880.—Complete freedom of judgment and action should in general be allowed as to keeping or suspending civil officials and employés during occupation. All those who fulfill political functions cannot, to be sure, be maintained in the exercise of their duties. As to all others, their retention or dismissal must naturally depend on the influence they may exercise, in the performance of their duties, on the necessities of war. With respect to railroad employés, for example, when the importance of railroad service, from a military standpoint, is realized, dismissal of the national personnel, who might cause considerable prejudice to the interests of the occupying belligerent, is justifiable. It must be deemed essential, however, that the railroad service be not disorganized, in order not to impair the interests of commerce and free circulation. It is necessary, moreover, to respect the legal rights of the dismissed employés against the State, according to the laws, and against the Railroad Company, according to contract, and to see that they are indemnified at the conclusion of peace for the losses sustained by reason of their suspension.

#### MEASURES OF SAFETY

**1553.** The military occupant of a territory has not only the right to require of the inhabitants complete submission to his authority and the right to punish any violation of that obligation; he has likewise the right to prevent any attempt at such violation by providing very severe punishments against any person making

or attempting to make an attack upon the established government and the safety of the army of occupation.

It should, however, be considered contrary to the principles of international justice to order summary executions or sentences of death without regular judicial procedure, for the purpose of inspiring terror in the population.

**1554.** The inhabitants of the country militarily occupied must recognize the authority of the government of occupation and refrain from any act likely, either directly or indirectly, to jeopardize the safety of the army of occupation or to impair its actual interests.

#### CRIMINAL LAWS AND CONVICTIONS

**1555.** The military government shall have the right to apply martial law in the occupied territory and also order such rigorous measures as may be required by circumstances. It may proclaim martial law and enforce any measure necessary to maintain its authority and prevent an insurrection. It must, however, exercise its authority without substantially violating the superior principles of the penal law of war, so far as regards responsibility, procedure, and trial.

The penal law of war likewise has its principles. It should be considered contrary to justice to inflict the death penalty for any offense whatsoever committed during military occupation, or to substitute collective responsibility for individual responsibility. This is what would happen if, for instance, communities were declared responsible for criminal offenses committed in their jurisdiction, or if the execution of a sentence should be ordered against any person suspected of an offense, without any semblance of trial.

**1556.** The various degrees of punishment inflicted may sometimes be necessarily severe owing to the degree of difficulty encountered by the sovereign occupant in retaining possession of the territory.

One can never, however, justify arbitrary punishments inflicted by the military authority without previous promulgation of an official decree or ordinance providing such punishment for the forbidden act.

PRIVILEGES OF THE OCCUPANT IN THE EXERCISE OF LEGISLATIVE  
POWER

1557. The occupant is not permitted arbitrarily to repeal the civil legislation of the conquered country, or to alter the public law in force. To exercise such power would be a perversion of his rightful authority and would be regarded as an unwarranted abuse of his functions, unless it can be clearly justified by the necessities of war.

1558. He must not, during the military occupation, alter the prevailing laws relating to judicial organization, jurisdiction and competence, save with respect to cases which must be submitted to special courts on account of their nature or military necessity, and cases within the jurisdiction of courts-martial. He must, with these exceptions, maintain the *status quo*, allowing ordinary courts to continue their regular functions.

1559. The occupant must provide for the regular administration of civil justice, and protect the status of persons and family relations, without modifying them in any way by general laws.

PUBLIC ADMINISTRATION

1560. It is the duty of the government of occupation to provide for the public service and administration. For this purpose it may request all employ  s whose functions have no political character, to continue in the performance of their duties. It has no authority to compel them individually, but may consider as an act of hostility the collective refusal of all the employ  s of the public administration or of a branch of the public service to perform their duties.

1561. During military occupation, the exercise of any function of sovereignty must be deemed regular and lawful, even as to consequences affecting private relations. Contracts signed by the government constituted by the army of occupation shall be valid, as well as transfers of property regularly made in conformity with the laws in force; and private persons shall be entitled to avail themselves of the rights acquired through judgments pronounced by courts of law during the occupation, provided such judgments can be regarded as final and as having acquired the authority of

*res judicata*. The same shall apply to any other right acquired and perfected under the laws promulgated and in force during the occupation.

#### RIGHTS OF THE OCCUPANT AS TO PROPERTY

**1562.** The military occupant shall have the unconditional right to take possession of, and appropriate to his own use, all property belonging to the State which he finds in the occupied territory. He shall have not only the right to take possession of arms, depots of munitions and supplies for the use of troops, and everything useful in warfare, but also of transportation and railroad equipment (locomotives, railroad material, ships, etc.), telegraph systems, building materials, etc., belonging to the enemy State.

He shall also have the right to take possession of the cash and of the liquid assets which are strictly the property of the State, whether this be in the public treasury or consist of claims of the State against private persons, provided they are claims due or becoming due during the period of occupation.

**1563.** The belligerent shall have no right to take possession of public property devoted to peaceful objects, e. g., religion, charity or education.

Such exempted property shall include the establishments and property belonging to churches, hospitals, and charitable institutions, those devoted to education, such as universities, academies, observatories, museums of fine arts and all endowments of a scientific or charitable character.

**1564.** The belligerent shall be permitted to enjoy all the advantages arising out of the temporary possession of all the property belonging to the public domain, but shall have no right to alienate such property, except when the alienation of a given portion thereof shall be required by the urgent necessities of war.

**1565.** The occupant must always deem private property inviolable and not confiscate it under any pretext, and acknowledge the same inviolability respecting municipal property. He shall have the right to subject to forced expropriation only such property of private persons which is likely to be required in the operations of war, subject, however, to the payment of a just indemnity,

or to the reservation of such payment as may be provided by the eventual treaty of peace.

He shall be able to levy contributions of war upon towns and communes in conformity with the rules which govern such levies.

See, as to requisitions, The Hague Convention at the end of this Title.

#### RAILROADS AND TELEGRAPH LINES BELONGING TO PRIVATE PERSONS

**1566.** During the military occupation, it shall not only be permissible to the occupying belligerent to make use of the railroad and telegraph material belonging to companies or to private persons, that may be required in the prosecution of the war, but he shall also be entitled to regulate with full freedom the management of such railroads and telegraph lines, reserving the rights of the companies or private persons in order that such rights may be adjusted at the conclusion of peace. He shall have no right, however, to take possession of the cash which may happen to be in the treasuries of companies. He shall be bound to organize the management and operation thereof in such manner as not unnecessarily to impair the rights of the companies and employees, and effectively to protect the interests of peaceful commerce.

#### RIGHT OF THE OCCUPANT AS TO TAXES

**1567.** During the military occupation, the government of the occupant shall have the right to collect the taxes already established by law in the manner and conformably to the usages in force in the occupied country. Power to amend the fiscal legislation or the system of levying taxes, and the privilege of introducing new taxes cannot wholly be denied to the occupant; but it is advisable that he should not undertake any legislative changes without necessity and that he should always exercise his sovereign powers with great moderation.

A modification in the system of levying taxes during military occupation might consist in subjecting towns to the payment of a single tax, leaving it to the municipal administration to apportion it out among the taxpayers. The preferable policy, however, is to make no changes either in the basis or form of the tax system unless such modification is urgently required by the necessities of war.

[See *U. S. v. Rice*, 4 Wheaton, 246; *Mazatlan and Bluefield's cases*, Moore's

Digest, I, 49 *et seq.*; Message of the President, For. Rel. 1900, xxiv; *MacLeod v. U. S.* (1913), 229 U. S. 416, 429—Transl.]

#### PUBLIC SERVICES

**1568.** The military occupant must devote the moneys collected by means of taxes to their natural and proper purposes, namely, that of providing for the needs of the occupied country and especially for public services, education, and public works.

The states represented at The Hague have settled in common accord the rights of the military authority over hostile territory. See Section III of the Regulations annexed to the fourth Convention. They have laid down the following rules, which have obligatory legal force among these states.

#### RIGHT OF THE BELLIGERENT OVER THE TERRITORY OF THE HOSTILE STATE

**ART. 42.**—*Territory is considered occupied when it is actually placed under the authority of the hostile army.*

*The occupation extends only to the territory where such authority has been established and can be exercised.*

**ART. 43.**—*The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*

**ART. 44.**—*A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.*

**ART. 45.**—*It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile power.*

**ART. 46.**—*Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.*

**ART. 47.**—*Pillage is formally forbidden.*

**ART. 48.**—*If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the state, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.*

#### *Money contributions, requisitions, contributions in kind*

**ART. 49.**—*If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.*

**ART. 50.**—*No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.*

ART. 51.—*No contribution shall be collected except under a written order, and on the responsibility of a Commander-in-Chief. The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force. For every contribution a receipt shall be given to the contributors.*

ART. 52.—*Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.*

*Rights over the property of the hostile state and of municipalities*

ART. 53.—*An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depôts of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the state which may be used for military operations.*

*All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depôts of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.*

ART. 54.—*Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.*

ART. 55.—*The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.*

ART. 56.—*The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when state property, shall be treated as private property.*

*All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.*



## TITLE X

### PRISONERS OF WAR. THE WOUNDED AND SICK

**1569.** Every individual is considered a prisoner of war who, taking part in the war either as a combatant or non-combatant, falls into the hands of the enemy in any manner whatever and is captured.

Persons attached to the service of the army (sutlers, contractors, etc.) or following it as journalists, reporters, etc., who fall into the hands of the enemy must, if the latter deems it expedient to detain them provisionally, be considered as prisoners of war.

**1570.** Any individual of the hostile army who lays down his arms and surrenders has the right to be safe from any attack upon his person and cannot either be wounded or killed; he is simply to be declared a prisoner of war.

**1571.** Any one who is declared a prisoner of war must, as such, be regarded as under the immediate control of the belligerent sovereign and not under that of the person who made him prisoner and who cannot, without violating military discipline, have any right to set him free and much less to exact from him the payment of any sum of money to buy his freedom.

#### DUTIES OF BELLIGERENTS TOWARDS PRISONERS <sup>1</sup>

**1572.** Belligerents must treat prisoners of war with humanity

<sup>1</sup> We reprint the rules that we proposed in the 2d, 3rd and 4th editions of the present work. They must be regarded as being founded upon the "common" law established by civilized states, as sanctioned in the instructions given by several states to their armies and navies, in conformity with the usages accepted in the wars of our time, in the *Manual of the Institute of International law*, arts. 61 *et seq.*, session of Oxford (1880), and in the numerous works which have treated the question. Of course, these rules could in reality only have compulsory legal force between states through their reciprocal agreement. Such an agreement was reached by the states represented at the Hague Conference which, among other matters, adopted rules concerning prisoners of war. We present hereafter their agreement on this subject.

and show them the regard which is due them by reason of their rank and civil condition. They must, besides, see that military commanders do not take any unfair advantage of their powers and punish any act of their inferiors violative of the respect due to prisoners.

**1573.** It must always be considered disgraceful and treacherous to deprive prisoners of their personal belongings (jewels, watches and the like), even if such objects are of small value.

Nevertheless, the commander always has the right to order that all personal belongings of prisoners be deposited by them to be sequestered during their captivity. It is only permissible to appropriate arms, horses and other objects pertaining to warfare.

**1574.** The capturing government shall defray the expenses of caring for prisoners of war, giving them lodging and rations according to their station and ranks, taking as a basis the salary of its own officers and soldiers, subject to the subsequent settlement in the treaty of peace of the respective expenses of maintaining prisoners.

**1575.** Lack of resources for the maintenance of prisoners of war cannot justify the conduct of a government which, in violation of the rules of "common" law, considers itself authorized to refuse to give quarter to soldiers who would surrender or to order the massacre of those whom it could not support as prisoners.

**1576.** The belligerent shall always be able to safeguard his rights and interests, either by making it impossible for prisoners to participate in the war operations, or by securing their pledged word not to take any further active part in the war, and then by punishing those who, having been set free, have been recaptured with arms in violation of their parole.

There is no doubt that the hostile soldier who surrenders at discretion is entitled to his life and that the belligerent cannot violate this right of man without committing a veritable crime. We absolutely deny, therefore, for any cause, however peremptory it may be, the right of a belligerent to deprive a soldier who has laid down his arms of his life.

We recognize only his right to punish a prisoner set free on parole not to take any further part in the war, whom he has recaptured bearing arms.

The military criminal code of Italy punishes with death a hostile officer who, set free on parole, has been recaptured bearing arms (art. 292).

The French code of military justice (art. 204, § 2), contains a similar provision.

## RIGHTS RESPECTING PRISONERS WAR

**1577.** The commanding officer of an army, who has prisoners of war in his power, may order that they be disarmed, making no exception for officers of all ranks, to whom, however, it is proper to restore their swords provided they have surrendered them in token of submission, and on condition of their remaining disarmed during their captivity.

**1578.** The government in whose power prisoners happen to be may employ them in useful labor, taking into account their respective rank and social status. In no case is it permissible to employ them in building fortresses or any work of defense even in a place far removed from the seat of war, whenever such works might be used in the operations of the war.

**1579.** A belligerent may, with respect to prisoners of war he does not wish to set free, take the necessary steps towards ensuring their custody and preventing their escape. He may intern them and confine under detention those he deems most necessary.

**1580.** Prisoners of war may be subjected, in principle, to the military laws and regulations in force in the country where they are detained; any act of insubordination or any attempt at revolt or escape may be punished under such laws and regulations.

**1581.** A prisoner attempting to escape is subject to disciplinary penalties. Recourse to armed force, as in warfare, is likewise permissible to arrest and capture him while in flight; but his escape cannot be regarded as a crime so as to subject to the criminal law a prisoner who has succeeded in escaping or has attempted to do so, should he again fall into the hands of the enemy or be captured in the attempt to escape.

**1582.** Plotting on the part of prisoners to recover their liberty and to employ the means likely to realize that end is liable to punishment as a military offense. Any act of resistance to the authorities entrusted with their custody shall likewise be considered as an act of rebellion and punished more or less severely, according to circumstances, and in serious cases even with the death penalty.

CONVENTIONS RESPECTING THE EXCHANGE AND RELEASE OF  
PRISONERS

**1583.** Exchange of prisoners between belligerents shall be effected as they may deem most convenient. If one of them declares his wish to release them on parole, he shall have no right to demand the same treatment, or the acceptance of an offer of exchange, from his adversary.

**1584.** When the exchange of prisoners or their release on parole, or the conditions respecting their maintenance have been the subject of a special agreement between the belligerents, it is necessary in determining the scope and execution of the convention to refer to the rules respecting conventions and agreements concluded in time of war.

**1585.** If a belligerent has accepted the offer of the enemy as to the exchange of prisoners and the conditions of the exchange have not been fixed, it ought to take place man for man, rank for rank, wounded for wounded, and under the same conditions on both sides.

**1586.** A belligerent shall have the right to release prisoners who are in his power, by imposing on the enemy the condition of exchanging a certain quantity of ammunition, stores and material necessary for the army; but it shall never be permissible to enter into an agreement with the prisoner himself for the purchase of his liberty.

PAROLE OF PRISONERS

**1587.** A belligerent cannot compel prisoners to give their word to comply with all the conditions which he imposes as the price of freedom.

A prisoner who has given a promise, contrary to military honor, which was imposed on him as a condition of his freedom, shall not be bound to keep his word. Nor shall the prisoner be constrained to keep his promise when, unable by the laws of his country to engage on honor to comply with the conditions which were submitted to him for his freedom and having so declared, the belligerent shall, notwithstanding, have imposed these conditions on him and obliged him to give his word of honor.

1588. The word of honor given on the battlefield while the battle is in progress, has no value. Neither is the word of honor valid, given when the fight is over, by a military commander in the name of a whole army corps, which would on this simple declaration be set at liberty.

1589. When prisoners have been released on parole, the government to which they belong must respect their parole and not impose on them any service conflicting with the obligation assumed.

Moreover, soldiers are bound to conform to the laws of their country when they assume obligations and give their word of honor to comply therewith.

1590. We must particularly condemn as dishonest and dishonorable the act of a government in compelling prisoners to serve against the enemy who has released them or against his allies, during the progress of the war in which the obligation of honor was assumed.

We cannot include in this category the act of a government which imposes on prisoners who have been given their freedom the obligation to perform active public duties at home or in the administrative services of the army.

The states represented at The Hague have established in common accord the following conventional rules as regards the treatment of prisoners of war. They are part of the 4th convention of the General Act of October 18, 1907, which was actually signed on June 30, 1908. They read as follows (*Annex to the Convention*):

ART. 4.—*Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.*

*They must be humanely treated.*

*All their personal belongings, except arms, horses and military papers, remain their property.*

ART. 5.—*Prisoners of war may be interned in a town, fortress, camp or other place, and bound not to go beyond certain fixed limits; but they cannot be confined except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.*

ART. 6.—*The state may utilize the labor of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.*

*Prisoners may be authorized to work for the public service, for private persons or on their own account.*

*Work done for the State is paid at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.*

*When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.*

*The wages of the prisoners shall go towards improving their position, and the*

balance shall be paid them on their release, after deducting the cost of their maintenance.

ART. 7.—*The Government into whose hands prisoners of war have fallen is charged with their maintenance.*

*In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging and clothing on the same footing as the troops of the Government who captured them.*

ART. 8.—*Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the state in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.*

*Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.*

*Prisoners who, after succeeding in escaping, are again taken prisoners are not liable to any punishment on account of the previous flight.*

ART. 9.—*Every prisoner is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.*

ART. 10.—*Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honor, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.*

*In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.*

ART. 11.—*A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.*

ART. 12.—*Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honor, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the courts.*

ART. 13.—*Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.*

ART. 14.—*An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.*

*It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners*

*who have been released on parole, or exchanged, on who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.*

ART. 15.—*Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.*

ART. 16.—*Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.*

*Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.*

ART. 17.—*Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.*

ART. 18.—*Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.*

ART. 19.—*The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.*

*The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.*

ART. 20.—*After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.*

#### HOSTAGES

**1591.** The custom of demanding one or more persons as hostages to ensure the fulfillment of certain agreements between the belligerents must be regarded as contrary to the laws of war.

**1592.** In no case may a belligerent consider himself authorized to put hostages to death because of the non-fulfilment of obligations or as reprisals in case the persons given as hostages to the enemy have been injured or killed.

**1593.** It shall only be lawful to detain certain influential persons as hostages in order to take advantage of their moral authority to obtain from a country the fulfilment of the obligations assumed by or imposed on it in time of war. Such persons must, however, be treated as prisoners of war, due regard being paid to their rank and condition; they cannot be punished nor subjected to cruel

treatment in case the purpose which was sought by detaining them as hostages has not been attained.

**DUTIES OF BELLIGERENTS TOWARDS THE WOUNDED AND SICK**

**1594.** Belligerents must consider the wounded and sick as exempt from the laws of war and allow the greatest freedom to the members of the medical service and to those assisting them. They must permit them to fulfill, under the protection of the "common" law of peace, their humanitarian mission, and remove all obstacles preventing their carrying out all the measures which, according to medical science and humanitarian requirements, they may deem necessary to ameliorate the condition of the wounded. The laws of humanity impose in effect a sacred duty to consider persons attached to and materials used in the medical service in time of war as inviolable.

**1595.** All the signatory states of the Geneva Convention of August 22, 1864, renewed July 6, 1906, respecting the amelioration of the condition of the wounded in time of war, or states which have adhered to that Convention, are bound to abide faithfully and strictly by all the provisions of that Act and must see that it is strictly complied with by soldiers, bringing it to the notice of all the army corps and punishing violations thereof.

**1596.** Similarly, Governments must accept the changes which are deemed necessary by specialists for the better functioning of the medical service in time of war, in order better to carry out the humanitarian purpose sought by the Geneva Convention.

**1597.** Any state which, in time of war, intends to abide by the laws of civilization and the duties of humanity must (independently of any participation in or adhesion to the Geneva Convention or of the observance of the same rules by the enemy) consider as an imperative principle of the law of natural justice and humanity the respect of sick or wounded soldiers and of the medical personnel by applying to them the laws of humanity rather than those of war, saving the necessary safeguard of its own interests and observing the rules which follow.

**1598.** Wounded or sick soldiers must be received and cared for, whatever their nationality may be. Therefore, it is left to the commanders-in-chief either to deliver up immediately to the hostile outposts enemy soldiers wounded during the fight, if circumstances



permit or to allow the greatest liberty to all persons of the medical corps in giving these wounded all the care and attention necessary.

#### AMBULANCES, HOSPITALS, MEDICAL SERVICE

**1599.** The personnel of military ambulances and hospitals, which comprises the commissariat, the medical service, that of administration and transport of wounded, as well as voluntary aids, members and agents of voluntary aid societies duly authorized to assist the official medical personnel, shall be considered neutral so long as they attend to their duties and there are wounded to receive and care for.

**1600.** The persons mentioned in the preceding article shall have the right even after the military occupation of the enemy has ceased, to continue attending to their duties in the hospitals and ambulances to the service of which they are attached, or to ask permission to join the corps to which they belong. It shall then be left to the officer commanding the army of occupation to insure the freedom of departure of such persons, subject to the conditions fixed by him in conformity with military necessities. He may impose on them the obligation to postpone their departure for a few days and have them escorted as far as the hostile outposts.

**1601.** Military ambulances and hospitals which are in territory occupied by the enemy also enjoy the privilege of neutrality, so long as they contain sick or wounded; and the evacuation of the ambulances and hospitals together with the personnel directing them shall likewise enjoy the same privilege.

**1602.** The belligerents must place on the ambulances, hospitals and wagons or other contrivances serving for the transport of wounded, the uniform and special flag prescribed by the Geneva Convention. This flag must always be accompanied by the national flag. In like manner, the personnel attached to the medical service must wear a special brassard, save when otherwise authorized by the military authorities.

#### RIGHTS OVER HOSPITAL FURNISHINGS

**1603.** The furnishings of military hospitals shall be subject to the laws of war, when there are no longer sick or wounded to be cared for.

The furnishings of field hospitals and ambulances enjoy the privilege of neutrality.

Persons attached to the hospital service shall always have the right, when they leave, to take away with them any articles of their personal property.

#### WOUNDED RECEIVED IN PRIVATE HOUSES

**1604.** It shall be left to the commanders of the belligerent armies to respect and protect the inhabitants of the country occupied by them who care for the wounded, and to encourage them by appealing to their generosity and granting them certain advantages in return for their generous conduct.

#### WHEN CAN THE MEDICAL STAFF BE DENIED THE PRIVILEGE OF NEUTRALITY?

**1605.** A belligerent has the right to deny all privileges of neutrality to the medical staff and establishments when it is shown and the proof thereof may be adduced, that the persons attached to this service, or the hospitals, establishments and ambulances designated to receive the wounded and sick, have been employed for any operation foreign to their humanitarian purpose.

#### DUTIES TOWARD THE DEAD ON THE FIELD OF BATTLE

**1606.** The belligerents must respect the corpses of soldiers killed in battle, protect them against plunder and outrage, insuring, by means of appropriate punishment, the observance of orders by their soldiers and by private persons.

**1607.** Outrages upon the corpses of soldiers killed on the field of battle and especially mutilation, shall be deemed dishonorable acts on the part of persons and governments which have not taken the necessary steps for their prevention.

**1608.** It shall be deemed a duty of humanity to take, when circumstances allow, the necessary measures to give burial to the dead and assure full liberty and absolute security to persons who may wish to fulfil this sacred duty.

**1609.** It shall likewise be considered a reciprocal duty upon belligerents, when they may do so without grave difficulties, to collect, before burying the dead, all the tokens likely to establish their identity and to forward these to the commander of the hostile army.

## **TITLE XI**

### **RIGHTS OF THE BELLIGERENTS OVER ENEMY PROPERTY**

#### **RIGHTS OVER THE PROPERTY BELONGING TO THE STATE AND TO PRIVATE PERSONS**

**1610.** A belligerent has the right to take possession of and confiscate property belonging to the enemy State which may come into his hands.

He may therefore seize and appropriate to his own use, arms and any kind of munitions of war, even if in warehouses, supplies, money and securities strictly the property of the State, the rolling stock of government-owned railroads and the apparatus of the telegraph service, war vessels and others adapted to war purposes, and in general, any personal property of the State apt to be used or usable for war purposes.

A belligerent is bound to respect and leave untouched the personal property of institutions dedicated to religion, charity, education, arts and sciences, notwithstanding the fact that such establishments belong to the enemy State.

**1611.** The private property of enemy citizens should be regarded as inviolate, in war on land as well as in maritime war, subject, however, to the limitations which may be regarded as based upon the necessities of war, the damage and destruction justified as incidental to attack or defense, and in certain well-established cases, the liability to confiscation, when the belligerent may be regarded as authorized to exercise the right of prize capture.

#### **ENFORCED EXPROPRIATION OF PRIVATE PROPERTY**

**1612.** Military commanders may take possession in enemy territory of the personal property of private persons which may

be useful for war purposes, and especially of property which may be required for security and defense, subject, however, to the obligation of indemnifying the expropriated owners.

**1613.** It shall be within the power of the aforesaid commanders in the enemy country to compel private individuals or corporations, by the use of force, if necessary, to surrender all such personal property as may, by its nature or design, be useful for war purposes, paying to such persons or corporations due compensation, or by reserving their right to obtain payment from the belligerent subsequently held obligated to pay.

The following property shall come under this head: railroad and telegraph apparatus, arms, munitions and supplies intended for the army and which might be needed for the equipment of troops.

Army commanders may also provide themselves in the enemy country with materials or supplies needed by them, by imposing requisitions and war contributions.

#### REQUISITIONS

**1614.** Requisition consists in providing things necessary to the troops (provisions, forage, fuel, clothing, means of transportation, etc.) by imposition of the commander upon the country crossed or occupied by him, and without any right to reimbursement.

**1615.** The military commanders who wish to make a requisition in the enemy country must apply to the local authorities, leaving it to the latter to furnish what is demanded of them and to apportion the burden among the inhabitants of the country.

The commander is always bound to give a receipt showing the nature and quantity of the things furnished which may serve as a title or evidence for any claims which may eventually be brought by the authorities or private persons who furnished the material requisitioned.

**1616.** When there is no authority in the enemy country to undertake the apportionment of the requisition, or when, on demand, they do not furnish the supplies promptly, or when their work is ineffective, the military commander has the right to order compulsory requisitions, employing soldiers directly to obtain the desired supplies from private individuals, delivering to them a mere receipt.

**1617.** Military commanders must undertake requisitions in the enemy country with moderation and caution, assisting the local authorities in maintaining order and not making excessive demands, having due regard to the means and resources of the country.

**1618.** It is not lawful in an enemy country to impose as a requisition any service of such a nature as to involve the inhabitants in the obligation to take part in military operations against their own country.

[See art. 52 of Convention IV, Hague Regulations of 1907—Transl].:

#### CONTRIBUTIONS OF WAR

**1619.** A request for money made in an enemy country constitutes a war contribution.

**1620.** A military commander may levy a war tax for the sole purpose of replenishing the military cash box. He shall be bound to deliver a receipt to the commune or person upon which or whom it was imposed so as to safeguard their rights to an eventual future reimbursement.

A contribution may also be levied against an enemy country by way of punishment when:

(a) The country has declined to satisfy a requisition of provisions or a service of any kind, and there is reasonable ground for belief that the refusal was impelled by ill-will or that the supplies requested have been sent away or concealed in bad faith.

(b) The country itself, or the authority representing the government thereof has violated the laws of war;

(c) There exists a well-founded suspicion that the authority representing the government of a country or of a commune has facilitated the execution of crimes punishable under the laws of war, or has negligently failed to prevent them.

**1621.** War contributions must be proportioned according to the resources of each country.

Heavier contributions may be imposed when they are inflicted as punishment, although they may not be so excessive as to become a veritable spoliation.

## WAR BOOTY

**1622.** Anything which, following a battle or fight, has fallen into the hands of the soldiers of the adverse party and whose owner cannot be found may be regarded as an object of war prize or deemed war booty.

**1623.** Every soldier may take the arms, horses and equipment belonging to the beaten enemy, but it shall not be lawful to take valuables belonging to the soldiers of the adverse party found dead on the battlefield or declared prisoners of war.

Wrongful appropriation of such articles must be deemed a crime punishable under military law.

The military penal code of Italy provides severe punishment for the wrongful appropriation of articles belonging to soldiers of the enemy, as follows:

**ART. 276.**—Whoever shall have despoiled a soldier or any other individual attached to the army or to a corps thereof, that is to say, a prisoner of war, who is found wounded, shall be punished, according to the circumstances, by death preceded by degradation, or by hard labor for life or for a fixed period.

**ART. 278.**—The party guilty of plunder shall be punished with a term in the military prison or some other form of punishment to be determined by special order.

The officer who failed to prevent plunder, while able to do so, shall incur the punishment of a term in the military prison accompanied by his dismissal.

When he shall have participated therein, the punishment shall be confinement in a military prison for not more than three years, always accompanied by dishonorable discharge.

**ART. 279.**—If in connection with the crime of plunder violence or maltreatment occur, the punishment inflicted shall be military confinement for no less than five or more than seven years if the guilty party is an officer, without prejudice to any punishment incurred for other and greater crimes.

## TITLE XII

### BELLIGERENTS IN NAVAL WAR

#### WHO MUST BE REGARDED AS BELLIGERENTS

**1624.** In time of naval war the following should be considered as having the status of belligerents:

(a) All war vessels of the enemy State, that is, those which, manned by a naval crew, under the direction of a naval commander, are authorized to carry the flag and ensign of the navy;

(b) The ships transformed by the State into war vessels and placed under the direct authority and immediate control and responsibility of the State whose flag they carry;

(c) The volunteer auxiliary navy created by reason of the war under due authorization of the Government;

(d) Private ships legally commissioned by the Government as privateers under letters patent or letters of marque;

(e) All the sailors constituting the crews of such ships;

(f) The mustered-in personnel of the coast guard;

(g) The marines of the naval reserve;

(h) The population of a territory not occupied which, on the approach of the enemy, immediately fit out vessels to combat them without having had time to have them transformed into war craft, provided such population acts openly and respects the laws and usages of war.

See the Manual adopted at Oxford by the Institute of International Law and published in volume xxiv of the *Annuaire*.

The formation of a volunteer auxiliary navy should always be authorized by decree of the sovereign. During the Franco-German war of 1870, the King of Prussia created a volunteer navy by decree of July 24, 1870, the text of which is here given as cited by Perels in § 34 of his work:

"I authorize, on your recommendation, the formation of a volunteer naval corps as follows:

"1. An appeal shall be made to all German sailors and ship owners requesting them to place themselves with their resources and ships at the disposal of the fatherland under the following conditions:

"(a) The vessels offered shall be examined as to their fitness by a commis-



sion composed of two officers and a naval engineer. Their value, if necessary, shall be appraised and the owner shall immediately receive one-tenth of the appraisement value to enlist sailors in sufficient number.

"(b) The officers and sailors thus enlisted shall belong during the war to the federal navy; they shall wear its uniform and insignia, be subject to regulations and shall take the military oath. The officers shall receive a commission of their rank and assurance that, on request, they shall, in case of exceptional service, be admitted finally into the navy. The officers and sailors who, in the performance of their duties and without any fault of theirs shall become *incapable* of working, shall receive a pension in accordance with the rules in force in the navy;

"2. The chartered vessels shall navigate under the military flag of the Confederation.

"3. They shall be fitted out for the federal navy according to the use that may be made of them."

Then follow the provisions respecting indemnities which we do not deem it necessary to give.

It ensues from this decree that the volunteer navy thus organized was to be considered as an auxiliary fleet of the regular fleet, and that, accordingly, the French government properly could not, as it did, protest against such an organisation, by claiming that its result was to restore privateering by artifice.

#### MERCHANT SHIPS CONVERTED INTO WAR VESSELS

**1625.** Any belligerent state shall have the right in a naval war to make use, in addition to its war vessels composing its regular fleet, of merchant ships fitted out as war vessels, when they meet the conditions required by the principles of international law.

All the ships of the belligerent state commissioned to take part in the war, whether combatants or not, belong to the armed force of the State and must be governed by the laws of war.

**1626.** All the states which have signed and ratified Convention VII, which is part of the General Act of The Hague of October 18, 1907, must, under this convention, comply with the following rules therein set forth, when they wish to add merchant ships to their regular fleet and assign to such vessels the status of war ships.

**1627.** *A merchant ship converted into a war vessel can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control and responsibility of the Power whose flag it flies (art. 1).*

**1628.** *Merchant ships converted into war vessels must bear the external marks which distinguish the war-ships of their nationality (art. 2).*

**1629.** *The commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet (art. 3).*

**1630.** *The crew must be subject to military discipline (art. 4).*

**1631.** *Every merchant ship converted into a war vessel must observe in its operations the laws and customs of war (art. 5).*

**1632.** *A belligerent who converts a merchant ship into a war vessel must, as soon as possible, announce such conversion in the list of war-ships (art. 6).*

These rules are the literal reproduction of articles 1 to 6 of the Convention relative to the conversion of merchant ships into war vessels; it is the VIIth Convention of the General Act of The Hague of October 18, 1907. This convention, signed at first by 29 states was subsequently signed on June 30, 1908, by the other states represented at the second Conference, with the exception of the United States, China, the Dominican Republic, Nicaragua and Uruguay. Turkey signed it with reservations.

**1633.** While the rules laid down in the foregoing articles can be deemed binding under the convention only upon the states which signed and ratified it, and then only in case of war among themselves, nevertheless, they must be considered as expressing just principles. No belligerent state can ever expect that merchant ships added to its regular fleet shall be regarded as warships capable of exercising the rights of war unless they display external distinguishing marks identifying them as belonging to the regular navy; unless in their conduct and operations, they comply with the laws and usages of war; unless they are under the direct supervision of the naval authorities of the State whose flag they fly; and unless the State which makes use of them for warfare assumes responsibility for their acts.

Even admitting that in case of urgent need and in order to increase the power of its navy, a state may appeal to the co-operation of its merchant marine, it must be considered indispensable, in order to prevent the indirect revival of privateering, to place the volunteer navy directly under the military authority of the State and to compel it to comply with military discipline. Otherwise, they would legitimate war waged by private persons in the interest of the State, but in their own way, which would be inconsistent with the fundamental principle that war must be a struggle between the military forces of the belligerent states.

During the war of 1870 between France and Germany, the Prussian military authorities, by decree of July 24, 1870, called upon all German sailors and owners of merchant vessels to place themselves at the disposal of the Government in order to be used against enemy war-ships. France protested against the conduct of Prussia, which had signed the Paris treaty of 1856,

insisting that she was reviving privateering. The protest, however, was considered ill-founded, on the ground that the merchant vessels which had heeded the appeal of the Prussian government could not be considered as private ships authorized to perform acts of warfare, since according to the decree, they were to be subject to the military authorities and fly the war flag of the Confederation (see the text of this decree in Perels, *Manuel de droit maritime*, note under rule 1605).

#### PRIVATEERS

**1634.** None of the signatory states of the Treaty of Paris of 1856 can authorize private ships to perform acts of warfare against the enemy as privateers, without violating the conventional rule established by that treaty, which has declared privateering to be abolished between the signatory powers and, at all events, can deny international responsibility arising out of the violation of the conventional legal obligation.

The declaration formulated at Paris in the protocol of April 16, 1856, was signed by Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey. The following states subsequently adhered to it: Belgium, Denmark, Greece, Netherlands, Portugal, Sweden, Norway, Switzerland, Argentina, Brazil, Chile, Ecuador, Guatemala, Haiti, Peru, and Uruguay.

Under this declaration, the above-mentioned states cannot fit out privateers in a war with one another. Some writers (cf. Wolheim de Fonseca, *Le commerce allemand et les tribunaux des prises français*; Gibson Bowles, *The declaration of Paris of 1856*) have raised the question whether the abolition of privateering, not having been stipulated in the treaty, but formulated by a declaration, should be considered as a rule of conventional positive law with respect to the signatory or adhering states; but the solution of this question cannot give rise to any serious difficulty. International agreements can be concluded in different ways (compare rule 746); now, the states having signed the protocol embodying the rules respecting maritime war, it is clear that they have thus established these rules in common accord with compulsory legal force both for themselves and adhering states.

It was also asked whether one of the signatory states could be released from the obligation of not fitting out privateers, by giving notice to the other states of its intention of withdrawing its full acceptance of the Paris declaration. A motion to that effect was made in 1877 in Great Britain and was subsequently discussed on the 2d of March, 1877, in the House of Commons (see for the details, Perels, § 34B and Gessner, *Préliminaire, Le droit maritime à l'époque actuelle*, pp. 55 *et seq.*) In order to remove all doubt, we refer to the principles laid down in rules 26, 830 and 912.

[The United States abstained from signing the Declaration of Paris because it did not, in addition to privateering, also abolish the practice of capturing private property at sea.—Transl.]

**1635.** Using privateers to fight the enemy must always be regarded as contrary to the fundamental principles of modern custom-

ary law, which aims principally at controlling and civilizing warfare and at rendering its baneful consequences less detrimental. Every civilized state should refrain from authorizing privateering.

**1636.** Fitting out privateers may be justified as a necessary measure of defense as regards a belligerent state which, under the right of reprisal, authorizes privateering against a hostile state which, in arbitrary violation of conventional law, attacks it by means of privateers.

**1637.** When a state is compelled to authorize privateering as reprisals against a hostile state not a signatory of the treaty of Paris of 1856 or not adhering thereto, or which violates that treaty, it must be regarded as bound to see that the exercise of the rights of war, on the part of the privateers which it has duly commissioned, are strictly regulated; it would incur responsibility for any negligent failure in this respect, or if it had not, by means of proper regulations, sought to prevent all excess and arbitrary acts on the part of its privateers.

**1638.** Privateers cannot be considered as belonging to the public forces of the State unless they are provided with the special authorization to undertake acts of warfare by the superior military authorities empowered to confer upon them the license to engage in privateering, known as *letters of marque*.

Acts of warfare undertaken by them shall not be deemed lawful unless the instructions contained in the *letter of marque* are strictly adhered to.

**1639.** Privateers duly authorized by a belligerent state possessing that right may demand that the laws and usages of war be applied to them, provided however, that they themselves observe the rules of war.

**1640.** A belligerent has no right to treat privateers duly commissioned by the Government of the hostile state as pirates, although it may have formally declared its intention so to consider them.

If, however, privateers have been authorized to wage war as such by one of the states bound by the prohibition against privateering contained in the treaty concluded at Paris, March 30, 1856, any belligerent could hold both the privateers and the state licensing them liable for the acts committed by them.

Compare rules 301, 603 and 611.

**1641.** If, under the national law of the flag of a merchant ship which has accepted letters of marque from a foreign government, national merchant vessels are prohibited from undertaking service as privateers for a foreign state under penalty of being treated as pirates, any such vessel could be treated as such, not only by the state whose nationality it bears, but also by any third belligerent Power against which it may have committed hostile acts.

There are numerous examples of the kind contemplated in this rule.

The French naval ordinance of 1681 reads as follows (III, art. 3):

"We forbid all our subjects to accept commissions from any kings, princes or foreign states, to arm vessels in time of war to act as privateers under their flag, without our permission, under penalty of being treated as pirates."

Sometimes the prohibition is decreed by each state declaring its neutrality, at the same time forbidding national merchant ships to accept letters of marque from either belligerent. This is what Spain and the United States did when the Franco-German war of 1870 broke out.

There are treaties in which it is stipulated that the respective merchant ships are prohibited from accepting letters of marque in case of war between one of the contracting parties and a third power.

Article 20 of the treaty of Sept. 10, 1785, between Prussia and the United States reads as follows: "No citizen or subject of the contracting parties shall take from any Power with which the other may be at war any commission or letter of marque for arming any vessel to act as a privateer against the other, on pain of being punished as a pirate."

It seems evident to us that in such a case the belligerent may treat as a pirate a privateer which has violated its national law.

**1642.** Privateers may be treated as pirates:

(a) If they wage war after the time fixed by the letters of marque which have authorized them to fit out as privateers, or after the war is over, and when their bad faith may be presumed;

(b) If they have accepted letters of marque from both belligerents.

Compare Perels, *Droit maritime*, § 34B.

**1643.** It is the duty of all civilized states to consider the abolition of privateering, which was declared binding upon the signatory states of the treaty of Paris of 1856, as the rule most rational and just to everyone, in view of the intrinsic difficulty of subjecting privateers to discipline.

It suffices to note that while the privateer is considered as belonging to the naval forces of the State, in reality it is subject to the authority of the captain.

Therefore, the absence of control of the military authorities constitutes a primary intrinsic difficulty to compliance with military duties, and to moderation and discipline on the part of privateers. Besides, as prizes are divided

between the State which has granted the letters of marque and the privateer, the result is to legitimate acts of warfare performed both for a private purpose and in a public interest and necessarily the use of armed force for the advantage of private persons.

It is preferable for states whose navy is inadequate to have recourse to an auxiliary volunteer navy.

The Italian merchant marine code lays down as a principle, in article 208, that privateering is abolished, and declares it lawful only by way of reprisal against states which have not adhered to the Paris convention of 1856 or have denounced it.

#### MERCHANT SHIPS ENGAGED IN WARFARE

**1644.** No private ship which has not been duly mustered into the navy of a belligerent state and which performs acts of hostility against the ships of the enemy state can expect such acts to be considered as acts of war. They must, on the contrary, be regarded as acts of piracy.

**1645.** The belligerent acts of any private ship which, even when privateering is permitted, operates without a legal commission or letters of marque, shall likewise be regarded as acts of piracy.

The acts of a privateer, provided with letters of marque, which exceed or are not comprised within its legal commission or letters of marque shall also be regarded as acts of piracy.

**1646.** Private ships shall be permitted, in time of maritime war, to resort to force to defend themselves against hostile ships which seek to attack them, and any hostile act accomplished by them under these circumstances shall be regarded as an act of legitimate defense.

**1647.** Any act of hostility on the part of a national merchant ship shall be likewise regarded as legitimate if the ship, being present when an enemy vessel attacks another national ship, proceeds to the latter's defense and in some way makes use of her armament to repel the attack.

[Whatever authority there may be for the arming of merchant ships to resist capture, a practice quite common during the wars between 1780 and 1860, and their conceded privilege, it is necessary to add that by so arming these vessels waive their immunities as merchant ships, with all the legal consequences flowing from that change of status. Their status as armed enemies is evident when the principle is recalled that war makes enemies of the nationals of the respective belligerents. By taking arms a vessel of a belligerent nation becomes an armed enemy, and can hardly lay claim to any immunities as a peaceful merchantman. The test of her status lies in her capacity to inflict injury upon a belligerent. Hence in these days, since priva-

teering and piracy have nearly disappeared, there is practically no importance attached to the distinction between arming for "defense" and arming for "offense." In our war of 1812 with Great Britain, there does not appear to have been any case where an armed merchantman claimed immunity from attack, with or without warning. The question of warning seems never to have been raised. This is made clear by Chief Justice Marshall and other justices of the Supreme Court in the case of *The Nereide*, 9 Cranch, 330. Neutral ships, it would seem, can hardly justify the carrying of armament, a practice entirely inconsistent with a non-belligerent status.—Tranal.]

## TITLE XIII

### ACTS OF HOSTILITY IN MARITIME WAR

#### GENERAL RULE

**1648.** Maritime war must be regarded, in principle, as subject to the laws and usages of war on land, except for the diversity in the means adopted to attain its ultimate purpose.

Belligerents cannot claim unlimited freedom in the choice of the means to be used to attain their purpose, which is to destroy the naval force of the enemy. They are bound, as regards means of attack and defense, not only to respect the prohibitions established by "common" and conventional law; but they must also refrain from attempting, by invoking the necessities of war, to justify certain usages commonly considered as contrary to the rational principles of international justice, the interests of international society and the sentiments of humanity and civilization.

At present, according to the customs admitted by the civilized states of Europe and America, maritime war is an armed struggle against the military power and naval force of the enemy and against its economic power, which gives rise to the attack upon the peaceful commerce of private persons of the hostile country.

The general conception of hostilities admitted and regarded as lawful in time of naval war is sanctioned in the instructions of the United States for the service of the navy of June 27, 1900, *The laws and usages of war on sea*, known as the *United States Naval War Code*.

Article I reads as follows: "The general object of war is to procure the complete submission of the enemy at the earliest possible period with the *least* expenditure of life and property. In maritime operations the usual measures for attaining this object are: To capture or destroy the military and naval forces of the enemy; his fortifications, arsenals, dry docks or dockyards; his various military and naval establishments, and his maritime commerce and communications; to prevent his procuring war material from neutral sources; to coöperate with the army in military operations on land, and to protect and defend the national territory, property, and seaborne commerce."

#### FIELD OF OPERATIONS OF NAVAL WAR

**1649.** The field of operations of naval war comprises the high sea and the territorial waters of the belligerents. Hostilities can-



not take place either in the territorial waters of neutral states or on parts of the sea conventionally neutralized, or in canals or straits which, for the protection of collective interests, have been neutralized.

Cf. Bonfils-Fauchille, § 1269; Perels, *Droit maritime*, § 553; Oppenheim, *op. cit.*, II, § 70.

Instances of waters neutralized in the collective interests of trade and commerce are numerous. Under the convention of Constantinople of October 29, 1888, the Suez Canal was neutralized, as were also, under the treaty of Berlin of July 13, 1878, the river Danube, from the Iron Gates to its mouth (art. 52), and the Congo and the Niger, under the treaty of Berlin of February 26, 1885 (art. XXV).

The belligerents may also, by means of conventions concluded in contemplation of war between them, establish in common agreement that acts of hostility cannot take place in certain parts of the sea. This was agreed upon in 1759 between Russia and Sweden with respect to the Baltic Sea and was proposed during the war of 1870 between France and Germany, with respect to the seas of the Far East. See Bonfils-Fauchille, *loc. cit.*

#### LAWFUL MEANS OF ATTACK UNDER PRESENT LAW

**1650.** Belligerents are permitted under the customs at present in force, to employ in maritime war the most powerful means of destruction and the terrible engines which modern science is constantly perfecting for annihilating the enemy's naval force.

They may, with that object in view, make use of cannons of all kinds, rifles of any model, torpedoes, ships of any construction, submarine boats and any other contrivance which may be invented to destroy the naval forces of the adversary as rapidly as possible.

Maritime war in our time is a veritable war of extermination and destruction, and modern science concentrates all its efforts towards securing the most up to-date and powerful means of sinking hostile warships with their crews. In short, naval battles are a destruction of naval forces and an annihilation of human lives. It is with reason that it is claimed as neither logical nor human to admit such customs; but they are the unavoidable consequence of maritime war, on account of the lack of conventional rules and the nature of the element on which the struggle is carried on. So long as war shall not have been abolished, it will always be difficult to regulate and place it in harmony with the principles of humanity. It is a pity that the noblest sentiments are disregarded, even those of loyalty and military honor, which ought to be respected during the struggle.

This can be said, for example, with regard to the use of submarines in launching torpedoes against which the enemy is powerless to defend himself. It may with reason be maintained that it is not fair to sink by means of submarines a ship which is unable to distinguish her adversary so as to enable her to defend herself against it, and that such unfair means of attack should be prohibited. But those who believe that one of the principal characteristics

of maritime war is a struggle for destruction, the purpose of which can only be attained through the annihilation of the crew of the hostile ship, go so far as to claim that any means of destruction aimed directly at the enemy is permissible and that, consequently, the use of submarines cannot be prohibited.

**MEANS THAT SHOULD BE CONSIDERED LAWFUL**

**1651.** Belligerents have not an unlimited right in the choice of means for injuring the enemy.

**1652.** Means which imply treachery must be regarded as unlawful. These should include:

(a) The killing or wounding of individuals of the adverse party by treachery;

(b) The improper use of the flag of truce, the use of a false flag or uniforms or insignia of any kind, especially those of the enemy, as well as the distinctive signs of hospital relief organizations indicated hereafter.

**1653.** The following must be deemed barbarous, in addition to prohibitions established in special conventions:

(a) The use of poison or of poisoned weapons;

(b) The use of arms, projectiles or materials capable of inflicting unnecessary injury. In this category must be classed explosive projectiles or cartridges of fulminant or inflammable matter weighing less than 400 grams.

**1654.** It should be considered as highly desirable for civilized states to agree to regulate maritime war and to insure in its prosecution the observance by the belligerents of the laws of honor and fairness.

These states, therefore, must prohibit any treacherous means of attack which, instead of aiming at paralyzing the naval force, inevitably results in the destruction of many human lives, victims to military duty, and they should limit and regulate the combat so that the attack will, so far as possible, be directed against the ship to compel her to surrender and not against the crew.

For this purpose, the use of torpedoes, submarines, ships laden with explosives, ships with rams, or hollow balls filled with inflammable materials, should be prohibited so as to reduce the struggle to an artillery combat, where treachery would not prevail, but where superiority would be assured to military art and the competent organization of the naval force.

The first Hague Conference of 1899 had already expressed the wish that governments should reach an agreement towards establishing uniform rules as to the types and bores of marine guns and cannons. The second Conference of 1907 thus formulated its wish on the 18th of October, at the signing of the General Act:

*The Conference expresses the opinion that the preparation of regulations relative to the laws and customs of naval war should figure in the program of the next Conference, and that in any case the powers may apply, as far as possible, to war at sea the principles of the convention relating to the laws and customs of war on land.*

It is necessary to note also that in the circular addressed on December 30, 1898-January 11, 1899, by the Russian government to the representatives of the foreign powers, among other subjects of discussion, the following were suggested:

"1. To prohibit the use in the armies and navies of any kind of firearms, and new explosives, or any powder more powerful than those now in use, either for rifles or cannon.

"2. To prohibit the use, in naval warfare, of submarine torpedo boats or submersibles, or other similar engines of destruction; to undertake not to construct vessels with rams in the future."

It is to be hoped that, having due regard to these precedents, civilized states will arrive at an agreement to render naval warfare less terrible, by prohibiting means of attack which, according to present customs, greatly shock the sentiments of civilisation and humanity.

#### BOMBARDMENT

**1655.** Bombardment may be considered as a lawful means of attack in naval warfare; provided, however, that it can be justified by the final end of war, and that it is effected in accordance with the rules of bombardment adopted in war on land.

This means of attack when resorted to in naval war for the sole purpose of terrifying the enemy, causing him damage, destroying public and private property, provided such devastation cannot be regarded as required by the actually pressing necessities of war, must be deemed unlawful and contrary to the rational principles of law and natural justice, which should govern war.

**1656.** It is incumbent upon all civilized states to recognize that the legal rules established and stipulated by the states represented at the second Hague Conference are the expression of the just principles of international law, and to comply with such rules in order to determine when bombardment may be deemed lawful and when unlawful in naval war.

Civilized states should repudiate the erroneous idea that any form of devastation, any means of terror by naval forces, any

damage caused to private persons of the hostile state with the object of terrifying them by the horrors of war may be justified, although not required by the urgent necessities of military operations.

It is not always easy to determine through positive, unequivocal rules when bombardment may or may not be justified by the necessities of military operations. Undoubtedly, a bombardment could never be deemed legitimate if effected for the sole purpose of terrifying, or of punishing the resistance of the enemy by the destruction of public and private property. Some of the partisans of unlimited bombardment seek to justify everything by means of the specious argument that anything which may increase the horrors of naval war tends to render it difficult and to shorten its duration; but that would render lawful any devastation, destruction, fire and all other measures calculated to terrify the state which resists, in an attempt to compel it to lay down its arms when it sees the disastrous effects of its resistance. The bombardment of Copenhagen by Nelson, in 1801, was designed to terrify the Danish fleet which was at anchor in the Sund and to accelerate its surrender, yet Cauchy has characterized the conduct of the British admiral as *perfidious* and *odious* and uncalled for (v. II, p. 255). Cf. Calvo, v. IV, § 2090-2091; Oppenheim, v. II, § 213; Bonfils-Fauchille, § 1277 and the report of Holland to the Institute of International Law at the session of Venice in 1896 and the rules voted by the Institute, *Annuaire*, 1896, pp. 311-312.

**1657.** The bombardment of an open and undefended city, or of unfortified ports and coasts must be regarded as unlawful when effected by naval forces and when not required by the necessities of war and of military operations.

These necessities may be recognized as valid when the purpose of the bombardment is to destroy dock-yards, military establishments, arsenals or war supply depôts.

Such would be the case also when the bombardment is designed to protect the landing of troops or marines which the inhabitants of the open and undefended town might seek to prevent.

**1658.** The following rules respecting bombardment by naval forces in time of war, formulated in convention IX, should be considered as legally binding upon the states which have signed and ratified the General Act of The Hague of 1907.

**1659.** *The bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings is forbidden.*

*A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor. (Art. 1.)*

**1660.** *Military works, military or naval establishments, depôts of arms or war material, workshops or plants which could be utilized*

for the needs of the hostile fleet or army, and the ships of war in the harbor are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons, immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph I, and that the commander shall take all due measures in order that the town may suffer as little harm as possible. (Art. 2.)

**1661.** After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts. (Art. 3.)

**1662.** Undefended ports, towns, villages, dwellings or buildings may not be bombarded on account of failure to pay money contributions. (Art. 4.)

**1663.** In bombardment by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white. (Art. 5.)

**1664.** If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities. (Art. 6.)

## UNLAWFUL MEANS OF ATTACK

**1665.** The use of bullets which explode on contact and flatten, causing wounds hard to heal should be prohibited to belligerents in naval warfare. This includes bullets with a hard envelope which does not completely cover the core and contains incisions.

The throwing of cannon shells or projectiles which emit asphyxiating or deleterious gases should likewise be prohibited.

As to the use of submarine mines, we must regard it as indispensable to the protection of the rights of peaceful commerce to recognize as binding upon all civilized states the following rules adopted in common agreement by the Powers represented at the Hague Conference of 1907.

It is the duty of every civilized state to declare these rules compulsory by means of instructions given to its navy.

The use of dum-dum bullets employed by certain states, among others by Great Britain in her colonial wars, was prohibited by the convention of St. Petersburg of November 29–December 11, 1878. See the note under rule 1484.

In like manner, the rule proclaimed by the first Hague Conference, which reads as follows, is to be observed: "The contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." (Third declaration of the Final Act of the International Peace Conference of July 29, 1899.) These various rules, binding upon the states which have signed the conventions wherein they are stipulated, ought to be likewise regarded as binding upon other states, by virtue of "common" law and of the general principles which compel belligerents not to violate the rights of peaceful traders of neutral states in time of war.

## AUTOMATIC SUBMARINE CONTACT-MINES

**1666.** It should be considered as forbidden as between the belligerent states which have signed or adhered to the Hague Convention of 1907, provided they alone are involved in war:

1. *To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;*
2. *To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;*
3. *To use torpedoes which do not become harmless when they have missed their mark. (Art. 1.)*

**1667.** *It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping. (Art. 2.)*

**1668.** *When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.*

*The belligerents undertake to do their utmost to render these mines harmless within a limited time and should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated at once to the Governments through the diplomatic channel. (Art. 3.)*

**1669.** *Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents. The neutral Power must inform ship owners by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel. (Art. 4.)*

**1670.** *At the close of war, the contracting Powers undertake to do their utmost to remove the mines which they had laid, each Power removing its own mines.*

*As regards anchored automatic contract mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters. (Art. 5.)*

**1671.** *The contracting Powers which do not at present own perfected mines of the pattern contemplated in the present Convention and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the matériel of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements. (Art. 6.)*

#### SUBMARINE CABLES

**1672.** *A belligerent cannot, in time of war, remove a submarine cable, when the interruption of telegraphic correspondence may be detrimental to the interests of neutrals, except when the latter allow the use of such cable for communicating with the other belligerent.*

He may cut a submarine cable which connects parts of the territory of the hostile state, and which connects his own territory with that of the other belligerent.

**1673.** A submarine cable between two neutral territories shall be deemed inviolable and shall not be cut.

A belligerent may, however, cut a submarine cable connecting neutral territories, if he has good reasons to believe that this means of communication is being used for war purposes.

**1674.** A submarine cable which connects neutral territory with a hostile territory may be cut in the territorial waters of the enemy.

It may also be cut beyond territorial waters in case of effective blockade and within the limits of the blockade line.

**1675.** Whenever the belligerent may deem it necessary by reason of the exigencies of war to cut a submarine cable, he must refrain from any unnecessary injuries which might make it difficult to put the cable into operation when peace is concluded.

**1676.** The preceding rules shall be applied without any difference between submarine cables belonging to the State and those belonging to private individuals. As regards private individuals, however, the expenses necessary to restore to service the cables cut by reason of the exigencies of war and the damages arising therefrom shall be repaid or settled at the conclusion of peace.

**1677.** It is to be desired that states shall in common accord establish rules for the protection of submarine cables in time of war, by completing the convention of March 14, 1884, and by providing that international correspondence, in the interest of neutral commerce and private persons, shall not suffer any of the unavoidable damages arising from its interruption on account of war.

So long as such a convention has not been concluded, the commander in chief of the fleet must determine, in his discretion, whether the exigencies of war make it indispensable to interrupt telegraphic communications. Since, by reason of its consequences, it is a very serious measure, he should act with moderation and great caution.

The rules we advocate are based on the principles admitted in conformity with the regulations of naval warfare, on the rules adopted by the Institute of International law at the session of Brussels of 1902, and on the doctrines of writers.

The United States Naval Code contains the following rules in its article 5:



"1. Submarine telegraph cables between points in the territory of an enemy, or between the territory of the United States and that of an enemy are subject to such treatment as the necessities of war may require.

"2. Submarine telegraph cables between the territory of an enemy and neutral territory may be interrupted within the territorial jurisdiction of the enemy, or at any point outside of neutral jurisdiction if the necessities of war require.

"3. Submarine telegraph cables between two neutral territories shall be held inviolable and free from interruption."

Cited by Oppenheim, v. II, § 214, p. 224.

Compare: Renault, *De la propriété internationale des câbles télégraphiques sous-marins*, in *Revue de droit international*, v. XII, p. 251; Holland, in *Journal du droit international privé*, XXV, 1908; Zumlin, *I cavi sottomarini e il telegrafo senza filo nel Diritto di guerra*; Perdrix, *Les câbles sous-marins et leur protection internationale*.

In the convention of March 14, 1884, the rights of belligerents are not regulated; on the contrary, under article 15, their freedom of action is expressly reserved.

#### LIMITATIONS UPON THE RIGHT OF ATTACK

1678. It should be held contrary to the law of nations to continue firing at a hostile vessel which, by striking its colors, manifests its intention to surrender.

1679. The commander of a warship who is sure that the striking of colors of the hostile vessel is not the result of an accident of the fight, but a sign of surrender, is bound at once to order the cessation of firing and must provide for the taking of the vessel.

These rules are based on the customary law of civilized countries.

Article 96 of the German instructions given by Perels, *Droit maritime*, § 35C reads as follows:

"As soon as a hostile ship has struck her colors, firing against her must cease, and she must be taken possession of at once. The commander must immediately send an officer with a provisional crew to take the ship and give notice to the admiral of the squadron."

Similarly, the Austrian regulations (111, n. 1488) provide as follows:

"If a foreign ship has struck her colors and if it is certain that the colors have really been struck and not carried away by a shot, firing must immediately cease." Compare Perels, *loc. cit.*

#### UNLAWFUL STRATAGEMS

1680. Surprise and stratagems implying deceit and violation of the laws of military honor must be held unlawful in naval warfare.

The simulation of the flag when it is the intention to commence action against the enemy must be regarded as such a stratagem.

**1681.** It may be permitted to the commander of a warship to hoist a false flag in order to escape the surveillance of a hostile ship on the high sea, but simulating a flag when an attack is about to be commenced must be held a deplorable violation of the laws of war and of military honor.

Such is the case also when the flag is hoisted, and at the same time a gun is fired to assert the true character of the flag.

The French decree of August 15, 1851, relating to service on board war vessels provides as follows in article 121:

"Before commencing action, the commander in chief shall order the distinctive signs and the French flag to be hoisted on all ships. In no case must he fight under a false flag. In night engagements, he must order a light to be placed over the flag astern."

Similarly, the Austrian regulations (111, n. 1476) read as follows:

"Before commencing fire, the national colors and the distinctive signs of the command must be hoisted. In night engagements, a light must be placed over the flag astern."

**1682.** The use of a false flag by a war vessel can never be legitimate, not even as a reprisal, in cases where she is compelled to hoist her own flag.

Conduct contrary to military honor on the part of a hostile ship can never justify the adversary in acting in like manner.

This rule may be considered as based on the regulations governing the laws of war drawn up by the Hague Conference of 1907, article 23f of which reads:

*"It is especially forbidden to make improper use . . . of the national flag, or of the military insignia and uniform of the enemy. . . ."*

While this text refers to war on land, no different rule should be admitted in naval war.

**1683.** It must similarly be regarded as absolutely forbidden during naval war, to use the distinctive signs of hospital ships established by the Hague Convention of 1907, in order to avoid the vigilance and action of hostile ships.

## TITLE XIV

### RIGHTS OF A BELLIGERENT WITH RESPECT TO PERSONS OF THE ENEMY COUNTRY

**1684.** A belligerent may declare as a prisoner of war any person of the enemy country who takes part in the war and falls into his power.

Accordingly, not only the crews of war vessels shall be captured, but also those of the volunteer navy and privateers duly authorized to take part in the war.

**1685.** A belligerent shall have no right to subject to the laws of war private non-combatants, that is to say, those who do not belong to the armed forces and do not take any part in the hostilities, although they may be on board war vessels for the purpose of fulfilling their peaceful mission. Therefore, it shall not be permissible to capture as prisoners of war physicians, nurses and priests on board a captured enemy vessel; they should be free to leave the vessel after having accomplished their mission and to take away with them all their personal property.

Compare art. 10 of the Convention of October 18, 1907, for the adaptation to maritime warfare of the principles of the Geneva Convention.

#### PASSENGERS AND CREWS OF CAPTURED MERCHANT VESSELS

**1686.** Persons on board a merchant vessel not members of the crew cannot be captured and declared prisoners of war, no matter what their nationality may be, except when, being citizens of the hostile state, there is ground to believe that they constitute part of the armed forces or are called upon to serve in the army or in the navy of their country.

**1687.** The crews of captured enemy merchant ships shall always retain their freedom, and it shall not be allowable, even by way of reprisal, to declare the members of the crew of such vessels prisoners of war, except when they have been guilty or suspected of veritable acts of hostility or of lending assistance to the enemy.

The belligerent shall, however, be allowed provisionally to detain the captain, owner, pilot and any other person whom it might be necessary to examine in order to ascertain the facts and circumstances, so long as their presence shall be deemed necessary for the preliminary examination into the case.

**1688.** The belligerent must land in a safe and hospitable place all members of the crew of the captured enemy merchant ship whom there is no need to detain conformably to the foregoing rule, and provide, in so far as circumstances permit, for their repatriation. It shall never be permissible to abandon them on barren and uninhabited coasts, nor in countries where their life and liberty might be in danger.

These rules, already proposed in the preceding editions (rules 1307, 1308) are opposed to customary law and the opinion of the majority of authors. In the Prussian regulations of 1864, it is provided in article 18: "The crew of a captured ship shall be maintained at the expense of the State until the decision of the case. If the captured ship is condemned, the citizens of the hostile State among the members of the crew shall be declared prisoners of war." The same provision is found in article 20 of the French instructions of 1854.

The British government favors the same custom and Lord Palmerston used to say: "If Great Britain did not detain as prisoners of war sailors of the hostile country taken on board a merchant ship, she would subsequently have to fight them on board hostile war vessels."

Among writers, we shall mention Ortolan, *Diplomatie de la mer*, II, pp. 35 *et seq.*, Hautefeuille, *Droit et devoir des neutres*, Westlake, in *Revue de droit international*, v. VII, p. 258; Oppenheim, *International Law*, v. II, §§ 201 and 249.

We have always considered war upon peaceful commerce as a veritable anomaly (Fiore, *Diritto internazionale pubblico*, §§ 1503 *et seq.*) and as a still greater anomaly the subjection to the laws of war of the peaceful citizens who belong to the crew of a merchant ship. Compare *id.*, v. III, 3d ed., § 1759. In order to justify the capture of hostile merchant ships, the pretext of weakening the commercial power of the enemy is invoked. But how can the capture as prisoners of war of the sailors of these ships be justified? The possibility of employing them on war vessels is alleged. If so, all enemy citizens who fall into the power of a belligerent ought to be declared prisoners of war, since they may be called to the colors. This custom, generally accepted, is contrary to the general principle that private persons who do not take part in the war must be considered as not involved in the hostilities in progress between the states of which they are citizens.

Fortunately, Convention XI of the General Act of The Hague of 1907 has settled the question conformably to more correct principles, in articles 5 and 6, which read as follows:

**ART. 5.**—"When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral state are not made prisoners of war.

"The same rule applies in the case of the captain and officers likewise na-

nationals of a neutral state, if they promise formally in writing not to serve on an enemy ship while the war lasts.

"ART. 6.—The captain, officers and members of the crew, when nationals of the enemy state, are not made prisoners of war, on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war."

#### THE SHIPWRECKED AND WOUNDED IN MARITIME WAR

1689. It is incumbent upon all states, even upon those which have not signed or adhered to the Hague Convention of 1907 to consider it a duty under the principles of humanity and civilization, not to subject to the laws of war the ships and craft which, at their own risk, during or after the fight, pick up shipwrecked persons or wounded without regard to nationality, but to regard such vessels as neutral.

1690. Every state which has seized a war vessel fitted out as a hospital ship with wounded and sick aboard, must deem it contrary to military honor and to its dignity to divert it from its special purpose and to subject it to the laws of war, by capturing it with its hospital material and declaring the sick and wounded prisoners of war. It must, on the contrary, allow the medical corps to continue to discharge its duties and when the sick and wounded, after having been tended and cured, are capable of resuming their military service, must allow them to return to their country, provided they give their parole not to take any further part in the war.

1691. It is the duty of the states which have signed the Hague Convention of October 18, 1907, to acknowledge the binding legal force of the rules respecting the wounded, the sick and shipwrecked persons in maritime war and to carry out faithfully all the stipulations of that convention with respect to persons and vessels designed to aid and assist them.

#### HOSPITAL SHIPS ACCORDING TO THE HAGUE CONVENTION OF 1907

1692. *Military hospital ships, that is to say, ships constructed or assigned by states specially and solely with a view to assisting the wounded, sick and shipwrecked, the names of which have been communicated to the belligerent powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected and cannot be captured while hostilities last.*

*These ships, moreover, are not on the same footing as war vessels as regards their stay in a neutral port. (Art. 1.)*

We reproduce verbatim the articles of the convention concluded by the states represented at The Hague at the second Conference of 1907. It sums up the wishes of philanthropists and scientists as regards the application to naval warfare of the Geneva Convention of August 22, 1864, which had already been declared extended to such warfare by the first Hague Conference of 1899. The Convention of 1907 is much more complete than that of 1899. It is the tenth convention of the General Act of The Hague and constitutes in that respect the "common" law of the 44 states which have signed it, except for certain reservations made by China, Great Britain, Persia and Turkey.

As regards other states, while not strictly binding, it must be regarded as the most complete expression of the principles of law and of humanitarian sentiments, which no government can with impunity violate; it ought to be declared compulsory at the beginning of every war.

This convention comprises 22 principal articles: the others, to article 28, refer to ratification and adhesions. We affix to these articles, in reproducing them, the consecutive numbers of the present work, indicating, however, at the end the number they bear in the convention.

**1693.** *Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.*

*These ships must be provided with a certificate from the competent authorities declaring that the vessels have been under their control while fitting out and on final departure. (Art. 2.)*

**1694.** *Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral countries, shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents with the previous consent of their own Government and with the authorization of the belligerent himself, and that the latter has notified their names to his adversary at the commencement of or during hostilities, and in any case, before they are employed. (Art. 3.)*

**1695.** *The ships mentioned in Articles 1, 2, and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.*

*The Governments undertake not to use these ships for any military purpose.*

*These vessels must in no wise hamper the movements of the combatants.*

*During and after an engagement they will act at their own risk and peril.*

*The belligerents shall have the right to control and search them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they can even detain them, if important circumstances require it.*

*As far as possible, the belligerents shall enter in the log of the hospital ships the orders which they give them. (Art. 4.)*

**1696.** *Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half in breadth.*

*The ships mentioned in Articles 2 and 3 shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half in breadth.*

*The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.*

*All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, and, further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed.*

*Hospital ships which, in the terms of Article 4, are detained by the enemy, must haul down the national flag of the belligerent to whom they belong.*

*The ships and boats above mentioned which wish to ensure by right the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain. (Art. 5.)*

**1697.** *The distinguishing signs referred to in Article 5 can only be used, whether in time of peace or war, for protecting or indicating the ships therein mentioned. (Art. 6.)*

**1698.** *In the case of a fight on board a war-ship, the sick wards shall be respected and spared as far as possible.*

*The said sick wards and the matériel belonging to them remain subject to the laws of war; they cannot, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.*

*The commander, however, into whose power they have fallen may apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded are properly provided for. (Art. 7.)*

**1699.** *Hospital ships and sick wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy.*

*The fact of the staff of the said ships and sick wards being armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, is not a sufficient reason for withdrawing protection. (Art. 8.)*

**1700.** *Belligerents may appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded.*

*Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed. (Art. 9.)*

**1701.** *The religious, medical, and hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they may take away with them the objects and surgical instruments which are their own private property.*

*This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the commander-in-chief considers it possible.*

*The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances in pay which are given to the staff of corresponding rank in their own navy. (Art. 10.)*

**1702.** *Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors. (Art. 11.)*

**1703.** *Any war-ship belonging to a belligerent may demand that sick, wounded, or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, or boats, whatever the nationality of these vessels, should be handed over. (Art. 12.)*



**1704.** *If sick, wounded, or shipwrecked persons are taken on board a neutral war-ship, every possible precaution must be taken that they do not again take part in the operations of the war. (Art. 13.)*

**1705.** *The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated cannot serve again while the war lasts. (Art. 14.)*

**1706.** *The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral state and the belligerent states, be guarded by the neutral state so as to prevent them from again taking part in the operations of the war.*

*The expenses of tending them in hospital and internment shall be borne by the state to which the shipwrecked, sick, or wounded persons belong. (Art. 15.)*

**1707.** *After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill treatment.*

*They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse. (Art. 16.)*

**1708.** *Each belligerent shall send, as early as possible, to the authorities of their country, navy or army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.*

*The belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospital and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country. (Art. 17.)*

**1709.** *The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. (Art. 18.)*

1710. *The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention. (Art. 19.)*

1711. *The signatory Powers shall take the necessary measures for bringing the provisions of the present Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public. (Art. 20.)*

1712. *The signatory Powers likewise undertake to enact or to propose to their legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the sick and wounded in the fleet, as well as for punishing, as an unjustifiable adoption of naval and military marks, the unauthorized use of the distinctive marks mentioned in Article 5 (rule 1696) by vessels not protected by the present Convention.*

*They will communicate to each other, through the Netherland Government, the enactments for preventing such acts at the latest within five years of the ratification of the present Convention. (Art. 21.)*

1713. *In the case of operations of war between the land and sea forces of belligerents, the provisions of the present Convention do not apply except between the forces actually on board ship. (Art. 22.)*

All the states represented at The Hague have subscribed this agreement, but China made a reservation as to article 21 (rule 1712); Great Britain, as to arts. 6 and 21 (rules 1697, 1712), and with a declaration that article 12 (rule 1703) should be considered as limited to the sole case of combatants rescued during or after a naval engagement in which they have taken part; Persia, under reservation of the right to use the Lion and Red Sun instead of the Red Cross; and Turkey, under reservation of the right to use the Red Crescent.

## TITLE XV

### THE CAPTURE OF ENEMY MERCHANT SHIPS AND CARGO

#### INVIOLABILITY OF PRIVATE PROPERTY

1714. According to proper laws of war, the property (ships or cargo) of private persons of the enemy state should be deemed inviolable in naval as well as land war, and it is the duty of all civilized states to make this rule obligatory through a conventional agreement, by declaring enemy merchant ships and their enemy cargoes to be inviolable, save when the ships clearly perform hostile acts and take an active part in the war under any form of assistance to the enemy fleet.

It is a great mistake and anomaly to implicate in a naval war private persons not involved in it, while the opposite doctrine prevails in land war. It is claimed that naval war cannot attain its object through the mere destruction of the naval forces of the enemy, but that it must besides ruin his economic and commercial power by attacking his shipping. This is a very weak argument for attempting to justify a barbarous practice. How, indeed, by causing actual and immediate damage to private persons, could the economic and commercial power of the State be weakened during the course of hostilities?

We have treated this question in detail in our work *Trattato di Diritto internazionale pubblico*, v. III, 3d ed., chap. X, § 11, pp. 195 *et seq.*

The great majority of writers favor the doctrine of the inviolability of private property in time of naval war. We may refer to the very complete bibliographical notes of Bonfils-Fauchille, 3d ed., § 1281; Oppenheim, *op. cit.*, v. II, §§ 173 and 180; de Boeck, *De la propriété privée ennemie sous pavillon ennemi*. See also the proceedings of the Institute of International Law at the session of The Hague of 1875 and of Zurich of 1877. For historical particulars, see, Nys, *Droit international, les principes, les théories, les faits*, v. III, chap. X; *La guerre maritime et la propriété privée ennemie sous pavillon ennemi*.

This doctrine is already accepted in practice by the most civilized states: it is expressly sanctioned in some treaties, among which we may note the treaty concluded between Italy and the United States on February 22, 1871. It is to be hoped that public opinion will succeed in overcoming the stubborn resistance of certain countries, among which Great Britain is especially notorious, and that ultimately an international agreement will proclaim the inviolability of enemy private property under the enemy flag.

At the first Hague Conference of 1899, the question of the inviolability of private property was considered; but the states represented confined themselves to expressing the desire that the proposition should be referred for ex-

amination to the next Conference. The question was again called up in 1907, but owing to serious differences of opinion and conflict of the respective interests, it was not discussed. Nevertheless, the wish was expressed that the program of the next Conference should be to draw up regulations of the laws of naval warfare, among which is comprised our proposal, which it is hoped states will finally agree to. This would be easy, if Great Britain would give up her traditional policy in the matter which maintains the utility of destroying maritime commerce during war and adopt the opinion of British jurists, who themselves disapprove it. See the important article of Hall in the *Contemporary Review*, v. XXVI, pp. 735 *et seq.*

[For an illuminating account by Harold Scott Quigley of the traditional policy of the United States in favor of the immunity from capture of private property at sea, cf. 11 Amer. Journ. of Int. Law (1917), pp. 820-838.—*Transl.*]

#### CAPTURE ACCORDING TO THE PRESENT CUSTOMS OF NAVAL WARFARE

1715. According to the present abnormal custom of naval warfare, it is to be regarded as lawful for belligerents to seize enemy merchant ships and the enemy cargo on board, and to exercise the right of capture with the purpose of confiscating both ship and cargo, since under the laws and customs actually governing the matter, the competent tribunal may declare the capture lawful and the prize valid.

#### CHARACTERISTICS OF THE RIGHT OF CAPTURE

1716. The right of capture as now admitted according to the abnormal usages of naval warfare, must be considered as an exceptional right, in derogation of "common" law.

It should, therefore, be considered in principle subject to restrictions likely to be favorable to those against whom it is invoked, rather than to greater extensions with a view to supporting the pretensions of the belligerent who seeks to appropriate and confiscate the prize.

1717. Any arbitrary exercise of the right of capture, although it is sought to justify it on the pretext of reprisals or reciprocity, must be considered as contrary to the true laws of war.

#### WHEN CAN THE RIGHT OF CAPTURE BE EXERCISED?

1718. The right of capture can only be exercised after a formal declaration of war and the opening of hostilities.

Hostile merchant ships which happen to be in the ports of a

belligerent when hostilities break out or which, having left their last port before the commencement of the war, have entered a hostile port not knowing that a state of war existed, ought not to be subject to capture and confiscation, but should be given a safe conduct for proceeding to their port of destination, as soon as they can be allowed to depart without prejudice to the exigencies of war.

It is the duty of belligerents to consider as *obligatory*, and not merely as *desirable*, the non-application of the exceptional right of naval warfare, which legitimates capture, to merchant ships which have entered their ports under the protection of the "common" law in force in time of peace.

Compare rules 1448 *et seq.*

This principle may be regarded as accepted under customary law. France and Great Britain acted accordingly during the war of 1854 with respect to Russian ships which were in French or British ports or were bound thereto, and gave them a time limit within which to seek safety. The same procedure was adopted by Prussia in 1866, by Russia and Turkey in 1877, by the United States in 1898, and finally by Russia and Japan in 1904. We do not know why the Conference of 1907 was satisfied with declaring merely as *desirable* what it should have considered as an absolute duty. See article I of the Convention given as a note under rule 1450.

#### WHO MAY EXERCISE THE RIGHT OF CAPTURE AND WHERE

**1719.** The right to capture enemy merchant ships belongs to the war vessels of the belligerents and to the vessels attached to the fleet and authorized to exercise the right of war.

In cases where the fitting out of privateers may be regarded as duly authorized, the right to capture private merchandise under the enemy flag shall similarly belong to privateers to which the belligerent sovereign has granted letters of marque, subject to the conditions imposed by those letters.

**1720.** A merchant vessel attacked by an enemy war vessel or privateer may always defend itself by every means and if it should succeed in capturing the ship which attacked it, it may claim the right of prize capture.

**1721.** The right of prize capture may be exercised in the territorial waters of the belligerents and on the high sea. It cannot be exercised in the territorial waters of neutral Powers, nor in neutralized waters.

A belligerent may, however, continue in those waters against an enemy merchant ship an attack and pursuit for purpose of capture which had commenced on the high sea and had been prosecuted without interruption.

#### OBJECT OF CAPTURE

**1722.** A belligerent may properly exercise the right of capture:

- (a) With respect to an enemy merchant ship;
- (b) With respect to merchandise loaded on board an enemy merchant ship, if the owner of the merchandise can be considered an enemy.

#### WHEN A MERCHANT VESSEL MAY BE REGARDED AS AN ENEMY

**1723.** The nationality of a vessel as ascertained by the ship's papers and by the flag it has a legal right to fly, must determine its legal status as an enemy or not.

**1724.** The nationality of the ship's owners cannot have any influence at the time when the belligerent, in conformity with existing usages, exercises his right to seize a vessel then entitled to fly the enemy flag. If the ship, however, belongs partly to citizens of neutral countries, that fact ought to be taken into account in the legal proceedings relating to the validity of the prize.

Our rule would apply to a ship which, carrying the enemy flag, belongs wholly or in part to neutrals who prove beyond doubt their right of ownership.

Considering that, in principle, the right of capture must be regarded as an exceptional right, whose scope should be restricted rather than extended, it follows that when a ship belongs wholly or in part to a neutral, a belligerent cannot confiscate it to his profit. The opposite principle is adopted by the courts, and was especially sanctioned by the judgment of the French Prize Court of December 22, 1870, in the *Turner* case, which states that from the viewpoint of the right of capture, the ownership of the vessel is wholly indivisible, and that neutral citizens, co-owners of the ship, cannot claim against the captor their share of property in a vessel navigating under the enemy flag. This decision is based upon a conception opposite to ours, which in fact deems it necessary not to restrict but to extend the right of capture. (Compare rule 1716.)

The opposite view was taken with more reason in the case of the ship *La Palme*, during the Franco-German war. That vessel, which carried the German flag, was seized, although, in fact, belonging to the Mission Society of Basel. The Prize Court had condemned the ship, but the Council of State reversed the decision on the ground that for Swiss owners of vessels, navigation under a foreign flag is a case of necessity, since Switzerland has no maritime flag. Rivier, *Droit des gens*, II, p. 345.

[Municipal law furnishes the test of title to fly the flag. In the United States, it is ownership by American citizens.—Transl.]

1725. Any vessel duly flying the enemy flag may be regarded as an enemy, in determining the legality of the seizure or the obligation to make compensation.

On the other hand, in order to determine the validity of the prize, it is necessary to ascertain the essential fact of the legal status of the owners of the ship and of the cargo.

1726. A belligerent cannot regard as an enemy and seize as such a vessel navigating under a neutral flag, although the property of a citizen of the enemy state before or even after the outbreak of the war, if it was really sold to a neutral, and it so appears clearly from the ship's papers, so as to exclude all possibility of doubt as to the transfer of ownership.

When the sale of a merchant vessel belonging to a citizen of the enemy state is made to a citizen of a neutral state, either prior to or after the outbreak of the war, and while *in transit*, the belligerent cannot disregard the effects of the transfer of property, which is lawful in time of war.

Perels quotes the report of the Attorney-General of the United States, who said: "Neutrals have the right to purchase the property of belligerents, whether ships or any other thing, during war, and any rule of any one state in opposition to this principle, which is conformable to the rules of international law, must be held contrary to public law and in pure derogation to the sovereign authority of every sovereign state." Opinion of May, 1855, in Soether's *Recueil*, nouv. série, I, n. 156 and of August 7, 1854, II, n. 182, given by Perels, *op. cit.*, § 36. Compare, Holland, *Prize Law*, § 19, and Oppenheim, *op. cit.*, II, § 199.

Of course, the whole proposition is based upon the fact that the bill of sale is *bona fide* and that property was really transferred without reservation to the neutral so as to exclude any element of fraud from the sale.

[While the law of the United States and of Great Britain is in accord with that of the vast majority of states to the effect that a sale of a vessel after the outbreak of war, from a belligerent citizen to a neutral, if *bona fide* and irrevocable, is valid, France is still numbered among the few countries which regard such a sale as *ipso facto* void, its law being therefore opposed to the general rule, which is approved by Fiore. See the case of *The Dacia*, captured by France, March 1, 1915.—Transl.]

#### NATIONAL SHIPS CAPTURED BY THE ENEMY AND RETAKEN

1727. A belligerent has no right to consider as an enemy vessel a national merchant ship captured by the other belligerent, and retaken by him before a Prize Court has passed on the ownership of the vessel and condemned it as enemy property.

**1728.** A national merchant ship captured by the enemy, even if taken by him to his ports, when retaken by a national war vessel, must be restored to its owner without subjecting him to the payment of any indemnity.

When retaken by a privateer duly commissioned, the owner could be made to pay compensation to the privateer.

It can never be considered as enemy property nor subject to the same rules as an enemy ship captured by a privateer.

The Italian Merchant Marine Code provides as follows in article 221:

"A national or foreign merchant ship chartered by the State, which has been retaken by a war vessel after having fallen into the power of the enemy, shall be restored to the owner, who shall not be subject to any payment of compensation.

"If the chartered ship has been retaken by a national merchant ship, the latter shall receive a reward to be paid out of the State Treasury, equal to a fourth or sixth part respectively of the property recovered, according to the various cases contemplated in the first part of article 219."

#### WHEN IS MERCHANDISE TO BE CONSIDERED ENEMY?

**1729.** All merchandise loaded on board a merchant ship duly flying the flag of the enemy state must be considered as enemy cargo and as such subject to the right of prize capture, provided it is the property of a person who, by his legal status, must be regarded as a subject of the enemy state.

**1730.** Merchandise belonging to a neutral when taken on board an enemy ship consigned to a person who, by his legal status, must be deemed a citizen of the enemy state, may be subject to the right of prize capture as enemy property, when the transfer of ownership of the merchandise may be considered as having taken place at the time of shipment but not if the transfer of title occurs on delivery at the place of destination.

Such determination of ownership may in a certain measure depend upon whether the merchandise shipped travels at the risk and peril of the shipper or the consignee.

The general principle *res perit dominio* may as a rule be applied; but the circumstance of the risk cannot always be decisive in determining ownership. It may happen that the seller has assumed the risks even of things which have become the property of the consignee. It is necessary, therefore, to examine the contract in order completely to settle the matter, which may have an influence on the decision as to the validity of the prize. As regards seizure, it may be admitted that a belligerent has the right to seize as enemy property all merchandise consigned to a national of the enemy state.



## ENEMY CHARACTER OF SHIP AND MERCHANDISE

1731. A belligerent may assimilate to an enemy vessel any ship, of whatever nationality and flag, which takes part in the war by performing acts of hostility and by lending assistance to his adversary.

He may therefore apply to it and to the merchandise on board belonging to its owner or charterer, the laws and customs of war applicable to enemy ships.

Albericus Gentilis held that any ship ought to be considered as an enemy which becomes so of its own accord. In undertaking to indicate when foreigners (neutrals) may be regarded as enemies, he said: "It is necessary to bear in mind the cause of the act, and as regards the foreigner (neutral), it must be ascertained that he does not do anything likely to be of advantage to the enemy, which would make an enemy of himself not unlike any other who might help the enemy. Any one must be considered as an enemy who does what pleases the enemy, and furnishes his army with things necessary for war. . . . Any one helps the enemy who by his co-operation makes him bolder. That can be said of the Hanseatic ships supplying the Spaniards with provisions and other war supplies." Albericus Gentilis, *De jure belli*, cap. XXII, no. 5. See the Italian translation of Fiorini, p. 353.

Everybody must recognize that in this quotation of Albericus Gentilis, written before Grotius, is found in condensed statement the true doctrine, of neutrality. Those who have not read the remarkable work of our countryman should not fail to do so in order to give him the credit he deserves.

## SHIPS AND PROPERTY EXEMPT FROM CAPTURE

1732. All the states which have subscribed the Paris treaty of 1856 or have adhered thereto must consider themselves legally bound not to exercise the right of capture in regard to neutral ships and neutral merchandise on board a captured enemy ship nor in regard to enemy property on board a neutral ship, and to consider the neutral ship and merchandise and enemy merchandise on board a neutral ship, as inviolate, except when the neutral ship is found guilty of violating a blockade or when the merchandise carried may be regarded as contraband of war.

The basis of our rules is the declaration signed by the states represented at Paris, which is an integral part of the treaty concluded between them on March 30, 1856:

"2. The neutral flag covers enemy goods, excepting only contraband of war;  
 "3. Neutral goods cannot be confiscated on board an enemy vessel, excepting only contraband of war."

1733. As regards the states not signatory to the treaty nor ad-

hering to it, the two rules established by the Declaration of 1856 must be regarded as expressing rational principles of law, and they must be recognized as having the binding force assigned to any rule of natural justice.

In fact, it is to be regarded as conformable to the general principles of law, not to be able to accomplish any act of hostility on neutral territory; to consider a ship as a dependency of the state to which it belongs, and consequently to have no right to capture enemy goods which happen to be on a neutral ship; nor to have the right to implicate neutrals in the war by applying to them the laws of war applicable to the enemy.

**1734.** Boats exclusively employed in coast fishing or in minor local navigation, together with their rigging, tackle, appliances and cargo, shall be considered as exempt from capture, according to the rules of "common" law and those established by the second Hague Conference of 1907.

This exemption shall cease as soon as they participate in hostilities in any manner whatever.

The contracting states must agree not to take advantage of the harmless character of these ships in order to use them for military purposes while preserving their pacific appearance.

**1735.** Similarly, ships employed in religious, scientific or philanthropic missions are exempt from capture.

The two preceding rules reproduce articles 3 and 4 of Convention XI of the General Act of The Hague of 1907 respecting certain restrictions upon the exercise of the right of capture in naval warfare.

Hospital ships and those engaged in receiving the wounded and shipwrecked must be considered as engaged in a philanthropic mission. Such ships are exempt from capture on the part of the states which have signed the Hague Convention of 1907.

Compare rules 1692 *et seq.*

#### PROPER RESTRICTIONS UPON THE EXERCISE OF THE RIGHT OF CAPTURE

**1736.** It is the duty of belligerents not to subject to the laws of war enemy ships which touch their coasts owing to a forced entry or shipwreck.

It must always be deemed contrary to the principles of humanity, natural justice and equity to take advantage of disasters of the sea in order to subject to the rigors of the laws of war those who have with difficulty been able to escape the dangers of the sea.

All writers do not admit this rule: Among those favorable to it, we find Bluntschli, rule 668; Boeck, no. 198; Gessner, p. 14; Calvo, § 2374. Among those who reject it are: Hall, § 145; Massé, v. 1, no. 363; Ortolan, p. 321; Perels, § 37, Oppenheim, § 189; Dupuis, no. 156.

**1737.** The right of capture must not be exercised with respect to ships flying a flag of truce and charged with carrying to the enemy a cartel or conveying communications; the rules governing flags of truce in war on land must be applied to them, subject to the same conditions.

Compare rules 1500 *et seq.*

**1738.** The right of capture must be considered as legally limited with respect to states which, by treaty, have undertaken in case of war to abstain from exercising the right among themselves.

This rule, however, would no longer be applicable in case of participation in the war by other states which have not signed such a treaty and have not, when war commenced, undertaken to comply with its provisions.

This conventional restriction upon the right of capture is found in the treaty concluded February 28, 1871, between Italy and the United States:

"ART. 12.—The high contracting parties agree, that in the unfortunate event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."

**1739.** Similarly, the right of capture shall be considered as legally restricted between states which, when war breaks out, formally undertake reciprocally to abstain from exercising such right in the course of hostilities.

There is a very important provision on this subject in the Italian Merchant Marine Code, articles 211 and 212 of which read as follows:

"ART. 211.—The capture and seizure of the merchant ships of a hostile nation by the war vessels of the State shall be abolished by way of reciprocity with respect to Powers which shall adopt the same treatment in favor of the national merchant marine.

"Treatment by reciprocity may originate in local laws, diplomatic conventions, or declarations made by the enemy before the outbreak of hostilities.

"ART. 212.—Capture and confiscation on account of contraband of war shall be excepted from the provisions of the preceding article; in such case, the offending ship shall be subject to the treatment of neutral ships violating neutrality.

"Capture and confiscation for running an effective and declared blockade shall likewise be excepted from the above provision."

Under these provisions, Italy is bound toward other states to regard as inviolable the private property of all belligerent Powers which have declared, before the outbreak of hostilities, their intention of abstaining from capturing the private property of Italian citizens.

#### MAIL STEAMERS AND CORRESPONDENCE

**1740.** It is to be considered as highly desirable that civilized states should determine by common agreement that private ships engaged in postal service between belligerent states and between them and neutral states shall be neutralized and subject to the same rules as the ships of neutrals, so far as the exercise of the rights of war are concerned.

Should the belligerent deem it advisable, however, to interrupt ordinary postal service between certain countries, the right to do so through a previous declaration should not be denied to him. In such case, mail steamers should always be allowed freely to return to their country, and the laws of war ought to be applied only to such of them as may subsequently have violated the prohibition to continue mail service.

Immunity for mail steamers in time of war is stipulated in treaties concluded between certain states. Thus, article 4 of the postal convention of June 26, 1846, between Great Britain and Denmark reads as follows: "In the event of war between Great Britain and Denmark, mail carrying ships shall be free to continue their navigation without hindrance or annoyance, so long as due notice shall not have been given by either one of the two governments that the service is to be suspended, in which case they shall be allowed free return, under special protection, to their country."

A similar clause is found in article 17 of the postal convention of 1833 between France and Great Britain.

**1741.** With respect to the states represented at the Hague in 1907, the following rules which they have adopted in common agreement must be regarded as legally binding:

*The postal correspondence of neutrals or belligerents; whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.*

*The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port. (Art. 1.)*

*The inviolability of postal correspondence does not exempt a neutral*

*mail steamer from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible. (Art. 2.)*

These are articles 1 and 2 of convention XI of the General Act of the second Hague Conference.

#### CAPTURE IN RELATION TO THE RIGHT OF PRIZE

**1742.** The capture or seizure of an enemy merchant ship and of the enemy goods on board, when it may be considered as properly effected according to the laws and customs of war, must always be deemed provisional and cannot have the effect of giving to the belligerent the right to appropriate the captured ship and goods. It must be considered as indispensable for that purpose to obtain from a competent court a judgment sanctioning the validity of a capture and of the prize, in conformity with the rules respecting the lawfulness of maritime prizes set forth hereafter.

#### OCCUPATION OF MARITIME TERRITORY AND ITS EFFECTS

**1743.** Occupation of maritime territories, that is to say, of gulfs, bays, ports, and territorial waters, is not possible except where continental territory is occupied. In that case, the occupation shall always be subject to the laws and customs of war on land.

## TITLE XVI

### CONVENTIONS GOVERNING WAR

#### WHO MAY CONCLUDE CONVENTIONS GOVERNING WAR

**1744.** The name convention of war is given to conventions concluded between belligerents to regulate any act or relation existing between them in time of war.

**1745.** Conventions providing for the general interests of armies and regulating the exercise of the reciprocal rights of belligerents in time of war can only be concluded validly by the supreme authority in the State.

The military commanders of the two belligerent armies can only conclude, within the limits of their powers, conventions providing for:

- (a) The necessities of the armies under their authority;
- (b) Matters which may concern eventual or temporary military interests relating to operations of war.

Conventions of this kind relate particularly to the reception of flags of truce, the exchange of prisoners, and the burial of the dead; suspension of hostilities, armistices, capitulations and agreements of any kind for the purpose of providing for the eventual necessities of war and having for their object certain well-defined military interests.

**1746.** Every convention of war must be scrupulously respected by belligerents and executed with integrity and in good faith.

It shall be considered as contrary to military honor to violate promises made to the enemy and agreements concluded verbally.

Our countryman Albericus Gentilis treats of conventions of war in chapters X and following of book II of his *De jure belli* and says: "In any war many things are done by means of arms but quite a number by means of compacts and conventions," and he expounded the principles which ought to govern the value of agreements between belligerents respecting truce, safe-conduct, the redemption of prisoners and hostages.

## SUSPENSION OF ARMS

**1747.** Suspension of arms consists in the interruption, for a purpose of general interest, of war operations for a fixed and very limited period (a few hours or at most a few days) in a particular place.

This may include the temporary cessation of hostilities to bury the dead on the field of battle; to effect an exchange of prisoners or the sick; to negotiate an armistice; to give time, in the event of bombardment, to the inhabitants of a fortified town to leave it without danger.

**1748.** The commanders of the hostile armies and any troop commander, acting separately and independently of the rest of the army, shall have the right to demand or grant a suspension of hostilities.

Such suspension may also take place by tacit understanding; but in that case it does not produce the same legal consequences and reciprocal obligation as the suspension of arms by express agreement.

**1749.** A commander who desires to request a suspension of arms shall be entitled to send a messenger with a flag of truce supplied with a declaration authorizing him to treat in the commander's name with the hostile commander. The latter shall not be bound to interrupt the battle or attack nor any other operations merely because of the appearance of the bearer of the flag of truce authorized to negotiate a suspension; he shall merely be obliged to comply with the rules governing the sending and receiving of flags of truce.

**1750.** The commander who receives a flag of truce may accept or decline the proposal to suspend hostilities. It shall, however, be considered contrary to military honor to refuse the suspension of arms requested for the sake of humanity, especially when the commander shall have no reason to suspect the good faith of the enemy and when no inconvenience or disadvantage from the viewpoint of military operations can arise from granting the request. (Compare rule 1608.)

## CONSEQUENCES OF THE SUSPENSION OF ARMS

**1751.** In case of a suspension of arms, provisions as to its duration and execution shall be precisely fixed either in writing or verbally. The military authorities shall clearly determine the respective obligations and reciprocal guaranties, the movements of troops, and especially state exactly the respective positions, so as to avoid any ambiguity and doubt.

**1752.** Once the suspension of arms is concluded, the commanders shall be bound to bring it at once to the knowledge of their troops and any unjustified delay shall be considered as a treacherous violation of the convention.

**1753.** Cessation of hostilities on the part of the hostile troops shall only be compulsory from the time their respective chiefs have directly brought to their knowledge the agreement to suspend hostilities.

Nevertheless, the commander of the troops who shall have been notified of the convention shall have the right to bring it to the knowledge of the commander of the hostile troops confronting him. The latter, while not bound at once to execute the agreement thus unofficially conveyed, must, however, take account of such notification and execute the operations in progress so as not to hinder the purpose of the suspension and at the same time try to get official communication of the agreement from his direct superior.

**1754.** When the time limit fixed by the convention shall have expired, hostilities may be resumed without any other condition, save in the event of extension by express agreement.

**1755.** In case of ascertained violation by the enemy of the conditions agreed upon, hostilities may be resumed at once and the suspension of arms shall thereby be considered as not existing.

## CAPITULATION

**1756.** A capitulation of war is a convention by which there are stipulated the conditions of the surrender of a fortress, of a fortified position or of an army corps or body of troops, which have ceased resistance. It may be concluded between the commander of the fortress, fortified position, or troops obliged to surrender and the hostile commander who directs the assault or battle.



**1757.** The capitulation is only valid when drawn up in writing by the commanders and signed by them. The conditions agreed upon between the respective military authorities charged with fixing the bases of the capitulation cannot be deemed effective unless approved and ratified by the commanders.

**1758.** It must be considered contrary to the usages of war between civilized peoples to refuse to grant the request for a suspension of arms made by the commander of a fortress or army corps with the declaration that he wishes to capitulate, whenever there is no danger in granting it and there exists no good reason to suspect the good faith of the enemy.

#### OBJECT OF THE CAPITULATION

**1759.** The commanders shall have the power to fix the conditions of the capitulation. They shall only be entitled, however, to adopt conditions within the limits of their powers and the purpose of the capitulation itself.

These include stipulations relating to the treatment of troops which capitulate; the mode of relinquishment of the fortress and the time allowed to evacuate it; the manner in which the delivery to the enemy of arms as well as war material, etc., shall take place; the mode of occupation by the latter of the fortress and its annexes or of military positions; and everything relating to military operations and to the condition of the troops and property belonging both to the soldiers and to the inhabitants of the place compelled to capitulate.

The commanders shall have no right to enter into any stipulations concerning the political or administrative status of the capitulating country or of another territory belonging to the vanquished state. Accordingly, all provisions relating to such matters shall be deemed inoperative.

The Italian legislature in its service regulations in time of war, 1882, fixed as follows the objects of capitulation:

"ART. 1155.—The following shall form the object of negotiations in capitulations: the treatment of the troops which capitulate, the hour at which such troops shall leave the place and the manner in which they shall evacuate their positions, the manner in which the delivery of arms, horses, and war material which the capitulating troops must surrender shall take place, the mode of occupation of the fortress and its annexes or of positions on the part of the victorious troops, the latter's obligations towards the persons and property of non-belligerents, towards hospitals, public establishments, etc.

"The contracting parties shall not be free to insert provisions relating to the situation or to the political or administrative status of the capitulating fortress or of any other territory."

Calvo, in his *Dictionnaire de droit international*, determines the objects of capitulation, and then adds: "but [there shall be] no stipulation relating to the political constitution and the administration of the capitulating city" (p. 123).

Considering these principles as established by "common" law, the reasoning of the partisans of the Pope's rights appears to have no serious ground. They base themselves in effect upon the fact that the capitulation signed on the 20th of September, 1870, between the commanders of the Italian and Pontifical troops relative to the surrender of Rome, does not include the Mount Vatican, the Castel Sant'Angelo and the "Citta Leonina," to contend that the Pope's sovereignty was reserved as to that portion of the territory. They forget that the military commanders were without power to stipulate anything in regard to the political and administrative status of the territory compelled to capitulate.

#### CONSEQUENCES OF THE CAPITULATION

**1760.** All the conditions agreed upon in the capitulation, which do not exceed the powers of the commandants, shall be faithfully observed and deemed obligatory upon the State just like any obligation assumed by a public official in the exercise of his public duties.

It shall, however, be considered as contrary to military honor and as an arbitrary and excessive proceeding to impose dishonorable conditions on a body of troops compelled to capitulate or on their commander.

**1761.** When a belligerent has imposed and obtained an unconditional capitulation he may exercise his rights with respect to persons, to the fortress or fortified position and to property within the limits of the laws and customs of war.

It shall never be permissible to put to death the commander or the soldiers, even when they have offered a stubborn resistance; it shall merely be permissible to declare them prisoners according to the usages of war.

In regard to property, the victor has the same rights as in the case of military occupation of the hostile country.

**1762.** The capitulation shall be considered valid and operative with all its necessary effects as regards the state against which it has been stipulated. Even when the commander of a fortress or of a body of troops has surrendered unconditionally without being compelled thereto by necessity, the sovereign may remand him

to a court-martial to account for his conduct, but he cannot disregard the effectiveness of the capitulation concluded by the officer.

**1763.** The commander of the fortress or fortified position who has capitulated must see that after the capitulation his troops do not destroy or damage in bad faith the defense works, nor carry away the arms and ammunition in their possession which must be turned over to the victor. Any destruction or wilful damage on the part of the troops after the conclusion of the capitulation shall be regarded as committed in bad faith and in violation of military honor.

#### OBLIGATIONS ARISING FROM A UNILATERAL ACT

**1764.** Military honor requires that commanders of armies or army corps shall strictly fulfill the engagements they have formally entered into by means of proclamations, formal promises and unilateral acts of whatsoever nature.

It shall be regarded as an act of veritable treachery for a military commander to violate his engagements formally undertaken.

#### SAFE-CONDUCT—LICENSES

**1765.** A safe-conduct consists in the permission given in writing by a commander to one or more persons to cross the zone of territory occupied by troops without being liable to any search or molestation.

License is the permission to undertake certain specific acts which as a rule are to be considered as prohibited according to the laws and customs of war and the provisions of martial law proclaimed by a commander in a certain locality.

**1766.** A safe-conduct may be temporary or permanent. The former is only valid for the time therein mentioned; the latter is valid as long as the war lasts or until annulled or revoked.

**1767.** A safe-conduct properly delivered by a competent authority shall be considered as subject to the following rules:

(a) When given to enable the holder to proceed to a certain place, it also includes permission to return therefrom, provided this is within the purposes of the safe-conduct;

(b) Permission to leave a certain place implies also that the holder shall be protected during the trip so long as he shall not go beyond the limits of the occupied territory or the lines of the troops;

(c) The safe-conduct is personal only and shall not be considered as applying to persons of the incumbent's family except when expressly so stated;

(d) The holder shall not be free to transport merchandise or other objects without special permission;

(e) The safe-conduct granted to a class of persons (newspaper correspondents, officers of neutral Powers following the operations of war, etc.) shall be understood to comprise all persons capable of proving that they belong to the said class;

(f) The safe-conduct granted to the diplomatic agent of a neutral Power shall be deemed to include all persons who, under international usages, belong to his official suite.

**1768.** Any person who has obtained a safe-conduct shall be bound strictly and faithfully to abide by its provisions. Should he violate or take undue advantage of his permission in a manner detrimental to the belligerents, he could be treated as an enemy and subjected to the laws of war.

**1769.** A safe-conduct may be withdrawn by any authority superior to the granting authority. The revocation, however, must be notified to the officer who issued it and to the incumbent, so that the latter may adopt any measures that circumstances may suggest to protect himself.

**1770.** A safe-conduct granted for a certain period expires automatically at the time indicated. Should the person to whom it is granted be prevented, however, by *force majeure* from getting completely out of the territory occupied by the troops, when the time expires, the military authorities, after having verified the circumstances of the case, ought to take such circumstances and the purpose of the authorization into account and consider such person as still protected by the safe-conduct.

#### SAFEGUARD

**1771.** Safeguard is a concession on the part of a belligerent, declaring certain persons or places to be relieved from the laws of war and covered by a special protection.

**1772.** A belligerent who has granted safeguard to establishments, institutions and places devoted to a public service must also consider as immune any persons connected with the management of these establishments. He must even respect enemy soldiers who may be there, and may not declare them prisoners of war, but shall provide them with a safe-conduct to rejoin their regiments.

#### ARMISTICE

**1773.** An armistice is a convention concluded by the commanders-in-chief of the hostile armies or by the sovereigns of the belligerent states, the purpose of which is the temporary cessation of hostilities in the whole theater of war. Should this convention be limited to a particular area, it would be known as a truce.

**1774.** An armistice must be considered as designed to provide an opportunity, while it lasts, for an agreement on peace conditions. In the meantime, it shall not be permissible to alter essentially the respective positions of the belligerents or to undertake military operations likely to modify the reciprocal situation of the armies or to affect the final outcome of the war.

**1775.** An armistice may be concluded for a time either fixed or indeterminate. In the latter case, it shall be fully operative until denounced by one of the belligerents.

Nevertheless, even when the armistice shall have been concluded for an indeterminate period or shall have been extended indefinitely, it can never be assimilated to peace, nor can the state of war be considered as terminated.

The principle just set forth is designed to establish the fact that an armistice, even when long protracted, cannot be assimilated to peace. Suspension of hostilities in the whole theater of war is one thing; concluding peace which implies immediate cessation of the application of the law of war, is another. An armistice, however long protracted, is not peace. So long as peace is not concluded, hostilities may be renewed—it would not require either a new object of dispute, new formalities, or a new declaration of war; notification of the ending of the armistice would be sufficient to renew and continue the hostilities interrupted. It is necessary to bear these principles in mind, because both in the relations of public internal law and in those of international law, during an armistice, however long protracted, the law of war, not the law of peace, must be applied.

## REQUISITES OF AN ARMISTICE

**1776.** An armistice must fulfill all the essential conditions of a treaty and can therefore only be valid if concluded by persons fully competent to do so.

**1777.** The commanders-in-chief of the belligerent armies must be considered as possessing the power to conclude an armistice. Should they have concluded it subject to the ratification of the head of the State, it would provisionally be fully operative during the time fixed by the commanders themselves for the exchange of ratifications.

**1778.** The armistice convention must be considered as perfected at the time of its conclusion and signature, subject to the provisions of the preceding rule.

It expires at the end of the time established in the convention which shall be fixed by counting the *dies a quo*.

**1779.** The contracting parties must clearly and precisely determine the conditions of the armistice, especially as regards:

(a) The day and hour from which the armistice shall commence and its duration;

(b) The principal lines of the respective positions of the belligerents and all other points calculated to determine the situation of the armies and to establish what is to be prohibited or allowed during the armistice;

(c) The determination of the time to elapse between the denunciation of the armistice by one of the belligerents and the renewal of hostilities, should the duration of the armistice not be fixed.

## RECIPROCAL OBLIGATIONS DURING THE ARMISTICE

**1780.** Independently of any express agreement, it shall be considered as absolutely prohibited during the armistice to undertake any defense work in the theater of war, to rebuild destroyed works, to introduce ammunition into a besieged fortress, or to undertake any operation whatever likely to strengthen the respective military positions on either side. But it is not forbidden to either party to do anything which, without substantially altering their respective military positions, might contribute to make the com-

batants stronger. Under this head we might include the drilling of troops, the manufacture of arms, the building of defense works outside the theater of war and any other operation which the belligerent might have undertaken had not the war been suspended, and which the enemy would have been unable to prevent had the struggle continued.

1781. A belligerent may not during an armistice revictual a besieged or blockaded place, but he cannot be denied the introduction into such place of the quantity of provisions which may be required for the daily consumption of the garrison.

To avoid all difficulty, it will be advisable to fix the quantity in advance in the convention itself.

#### EXECUTION OF THE ARMISTICE

1782. An armistice, whatever its conditions may be, must be executed honestly and in good faith. The commanders of the armies must notify its conclusion as soon as possible, and all the military authorities to whom it shall have been officially communicated must at once order the suspension of hostilities.

1783. The contracting parties are bound to carry out faithfully those provisions of the armistice which concern their relations with private persons and with the inhabitants of the country militarily occupied by either of them.

It shall always be deemed contrary to military honor and to the laws of war for a belligerent during the armistice to incite to rebellion or treason the inhabitants of the territory he occupies or in any way to encourage the soldiers of his adversary to desert.

#### ACTS OF HOSTILITY DURING THE ARMISTICE

1784. Any violation of the armistice committed by one of the parties shall give to the other the right to denounce the convention and to renew hostilities. Should the violation be serious, the other party could, by this very fact, consider the armistice convention as terminated. Such a violation would involve the international responsibility of the State just as any wrongful violation of a treaty legally concluded.

It shall not be deemed a violation of the armistice for a body

of troops to have continued hostilities after the conclusion of the armistice, but prior to their notification. The case would be different if the delay in notification should be considered as due to bad faith; it would be so presumed if sufficient time had elapsed to communicate it.

**1785.** Hostile acts on the part of private individuals or volunteers not under military authority, who have acted on their own initiative without the tacit connivance of the military authorities or of the Government, shall not be considered as violations of the provisions of the armistice. They merely warrant the belligerents in treating the persons who have committed such acts, knowing of the armistice, as rebels punishable under martial law, or to request their punishment by the hostile Government. Furthermore, when these acts are such as to involve the indirect responsibility of the Government, the belligerent shall have the right to claim an indemnity for the injury sustained.

#### TRUCE

**1786.** A truce or local armistice does not completely interrupt hostilities or the war, but merely suspends the belligerent operations in that portion of the territory to which the convention refers.

A truce is subject to the same rules as an armistice, and may be considered a local armistice.

Albericus Gentilis defines a truce as follows: (Lib. II, cap. XII, *De jure belli*): "A truce is a convention between enemy parties reciprocally to abstain from giving offense to one another for a short period of time. . . . It takes place in the course of hostilities not in order to end, but merely to interrupt them. . . . A prolonged truce would bear great similarity to peace."

#### PRELIMINARIES OF PEACE

**1787.** Conventions by means of which the preliminary conditions of peace are determined can only be validly entered into by persons competent to conclude a treaty of peace under the constitutional law of the belligerent state, and they are subject to the same rules as such a treaty. The stipulations of these conventions to prepare the conclusion of final peace shall be deemed obligatory and must be observed honestly and in good faith, so long as the negotiations for peace shall not have been terminated or suspended.



## TITLE XVII

### RIGHTS OF BELLIGERENTS TOWARDS NEUTRALS

**1788.** Every belligerent state has the right to subject all neutral states to the exigencies and requirements of the war.

For this purpose it may require:

(a) That every neutral state shall strictly maintain its legal status as such and observe its neutral duties as determined by the common law of nations, express conventions and the general principles of international law, under penalty of assuming the position of an enemy when it commits hostile acts;

(b) That the ships of neutral states shall be subject to interference with their peaceful commerce by being compelled to refrain from trading with hostile places effectively blockaded;

(c) That no neutral state shall directly perform acts of assistance for the enemy, nor fail in due diligence to prevent its nationals from lending such assistance;

(d) That no merchant vessel flying a neutral flag shall carry to the enemy goods considered as contraband of war;

(e) That every neutral merchant vessel shall submit to search on the high seas and in the territorial waters of the belligerent state, with a view to determining its legal status as a neutral and the nature of its cargo;

(f) That the penal sanctions provided for by international law to compel the observance by neutrals of the laws and customs of war and the legal protection of the rights of belligerents as respects neutrals shall be applied by a competent court.

**1789.** No belligerent has the right to claim the respect of its own rights by neutrals unless it strictly observes, in their exercise, the laws and customs of war which govern those rights.

**1790.** The laws and customs of war which ought to govern the rights of belligerents toward neutrals and the duties of neutrals must be those established in conformity with the customary law of

nations and with conventional law, and in their absence in conformity with the general principles of international law.

Among the states represented at the second Hague Conference the rules which are established in conventions constituting a part of the General Act of October 18, 1907, must be considered as legally binding.

## TITLE XVIII

### NEUTRALITY AND THE RIGHTS AND DUTIES ARISING THEREFROM <sup>1</sup>

#### CONCEPT AND NATURE OF NEUTRALITY

1791. Neutrality, objectively considered, is in itself a state of fact, and consists in the complete abstention from any hostile act against either one of the belligerents and from any act calculated to favor either one of the belligerents in their military operations.

Subjectively considered, it indicates the legal status of a state which, in the event of war, takes no part in the hostilities, either directly or indirectly.

The definition of neutrality given in preceding editions of this work and which is here reproduced, has given rise to various criticisms on the part of those who have not carefully considered our concept. It is our intention to determine synthetically the objective and substantial conditions from which are derived the legal situation and condition of a neutral. Such a legal state or condition of a neutral power may be called neutrality; but, as every legal relation presupposes certain conditions of fact from which arises the condition of law (*jus ex facto oritur*) regulating the presupposed fact which constitutes and characterizes the status known as neutrality, we have maintained, and still maintain, that such a preliminary fact consists in the complete abstention from any hostile act against the two belligerents and from any act calculated to be of assistance or aid to either one in the prosecution of the war. Accordingly our definition did not refer to the legal content of the state of neutrality, and consequently did not determine the legal conditions of neutrality, and did not specify which acts might be considered as giving assistance. Matters relating to the legal content were not the object of our definition; we referred to the presupposed fact out of which arises the legal concept, namely, the fact from which arises the original right itself and the legal status called neutrality.

1792. Neutrality may be voluntary, absolute or conventional.

The first is a consequence of the autonomy of every state and

<sup>1</sup> The rules concerning neutrality, and the rights and duties arising therefrom are reprinted in the same form as presented in preceding editions of this work.

of the right which it possesses to regulate with complete independence all matters concerning its relations with other states and to determine freely the position which it intends to assume on the outbreak of war.

The second is the neutrality which in a general and absolute manner is imposed in the common interest of all the states upon one of them, either by means of a general treaty or of a rule established in common accord by the states assembled in a Congress, or through conditions agreed upon as to the recognition of the international personality of such state.

The third may be the consequence of a special treaty, by the terms of which two or more states undertake by reciprocity to observe neutrality in the event of a war between one of them and a third power.

**1793.** General or absolute neutrality should be deemed under the legal protection of all the states interested in having it respected.

#### STATES ENTITLED TO BE CONSIDERED NEUTRAL

**1794.** Every state has the right, when war breaks out, to declare and notify, through diplomatic channels, its intention to remain neutral. Having made such a declaration and notification it has the right to expect to be considered as a neutral and shall be entitled to the rights which arise from such legal status from the time of its declaration.

States whose neutrality must be deemed obligatory shall be considered *ipso facto* neutral as soon as war breaks out.

**1795.** A state which did not declare its intention of remaining neutral, but actually fulfills the conditions necessary to be so considered, in the fact that it does not, directly or indirectly, take any part in the war, shall have the right to be considered neutral and entitled to enjoy and exercise the rights arising therefrom on condition of complying with the duties of neutrals.

**1796.** A state forfeits its right to neutrality whenever it takes part in the war for any reason, or furnishes assistance to a belligerent, either by undertaking some hostile act against one of the belligerents or by promising to do something which may be regarded as an act of military assistance.

The act of assistance does not lose its character as such by reason of the fact that the state would be obliged to undertake it on account of a previous treaty concluded with a belligerent, or otherwise.

**1797.** No state may limit its neutrality to a part of its territory only.

The legal status of every state, from the viewpoint of absolute abstention or non-abstention from the war, shall be considered just as indivisible as its personality.

**1798.** No state which is the ally of a belligerent in a war waged by the latter against a certain state can lay claim to being a neutral in another war sustained at the same time by its ally against another state.

The assistance given to a state in a war is undoubtedly an indirect help in any other war waged against another country by that state, since its result is to make the belligerent stronger as against both adversaries.

#### RIGHTS OF NEUTRAL STATES

**1799.** Any state which has declared its neutrality may make use of its military forces to defend it. In like manner, states which have declared themselves neutral can form an alliance among themselves in order to defend their rights as such.

At any rate, the states which have remained neutral could increase their armaments with a view to defending their neutrality.

**1800.** Every neutral state may claim the legal and legitimate enjoyment of all the rights appertaining to an independent country in time of peace. It cannot, however, exercise them except subject to the restrictions made necessary by and the requirements of the state of war.

**1801.** No limitation upon the exercise of the rights of neutrals may be arbitrarily imposed by either belligerent. Such a restriction is only justified when provided for in the conventional rules established by the states with regard to their reciprocal duties in cases where they shall have declared their intention of remaining neutral, or when the restriction arises from the very nature of neutrality.

What has rendered the legal status of neutrality uncertain and indefinite is the lack of positive rules regarding the duties of neutrality. Neutral states must undoubtedly suffer from the consequences of war and their rights must

be exercised with such limitations as the requirements of the struggle may impose. But should the belligerents themselves be permitted to determine the duties or other conditions to be imposed upon neutrals the result would be that when either one of them should unduly increase the restrictions placed upon the exercise of the rights of neutrals, all that the belligerent would have to do to justify his claims would be to invoke the so-called necessities of war. Restrictions would then be made so severe that neutrals would not be able to exercise the rights to which they are entitled. To prevent all arbitrariness in the matter it must be admitted as a fixed rule that the exercise of the rights of neutrals cannot be otherwise limited than in accordance with the rules of law relating to the duties of neutrals.

For further discussion of this point see our former work, *Diritto internazionale pubblico*, v. III, 3d ed., chap. entitled "*Considerazioni storiche sulla neutralità*" (Turin, Unione Tipografica Editrice) and the French translation of Ch. Antoine (Paris, Pedone-Lauriel, publishers).

#### INVIOABILITY OF NEUTRAL TERRITORY

**1802.** It must be considered an absolute right of any neutral state to preserve, during the war, the inviolability of all its territory with its dependencies and of its territorial waters, and to insist that no act of warfare shall be consummated therein by any of the belligerents.

**1803.** The belligerents are bound scrupulously to respect the inviolability of neutral territory and its dependencies and to abstain from committing therein any act of hostility, even of completing therein a military operation commenced outside such territory.

Every act of warfare undertaken or accomplished in the territory of a neutral state must be considered as contrary to the laws of war. Accordingly, it is unlawful to seize an enemy ship within the territorial waters of a neutral country, even when the ship has taken refuge there in order to escape the enemy.

If, however, a belligerent should commence an attack on the high seas and near the end of the battle the attacked ship should enter neutral waters, the inviolability of such waters could not be considered as infringed by the fact that the attack ended there, provided there was unity of action on the part of the enemy war-ship.

#### INDEPENDENCE IN THE EXERCISE OF THE RIGHTS OF SOVEREIGNTY

**1804.** Every neutral state is entitled to exercise with absolute independence its rights of sovereignty in time of war as in time of

peace. The free exercise of these rights may not be restricted on the ground of the possible consequent prejudice to either belligerent. It may be limited only in accordance with the preceding rules, or under special circumstances calculated to attribute to the acts of sovereignty the character of interference and of assistance to one of the combatants.

This rule may find its application in the case of a neutral government having recognized a government constituted by an insurgent party, in a civil war, by regarding it as entitled to all the rights of a belligerent. Such a recognition may, of course, be considered unwarranted by the particular government which characterizes the insurgents as rebels; the conduct of the neutral government might be regarded as a manifestation of sympathy towards the insurgent party, and on the other hand as an unfriendly act towards the constituted government. Yet the neutral state cannot be denied the right so to act.

(Compare Rule 173.)

#### FREEDOM OF PEACEFUL COMMERCE

**1805.** A neutral state has the right to protect the freedom of peaceful commerce of its citizens in time of war, and to insure in every way the security of navigation and the inviolability of its merchant vessels and their cargoes. It is likewise its duty to protect the undeniable rights of its nationals to be considered as exempt from the laws of war so long as they have not infringed the duties of neutrality, and to safeguard their right to do business as freely as in time of peace. Moreover, such right may be exercised through the maintenance of commercial relations not only between neutral ports and those of the enemy, but between any two ports of the belligerents, in execution of treaties concluded during peace and which must be considered as having remained in full force notwithstanding the outbreak of war.

**1806.** The belligerents are bound to consider in full force treaties concluded during peace with states which, at the outbreak of war, have made a declaration of neutrality, and to continue to assure to them and to their citizens the full enjoyment of all the rights and advantages arising out of these treaties, just as if the war, to which these states remain neutral, had not supervened.

Since it is of the very nature of neutrality that the international law governing peaceful relations subsists in its entirety between the belligerents and neutral states, it follows that it is not sufficient in order to suspend such right or to modify its application to invoke the pretended right of preventing neu-

trials from profiting from the advantages which the war may give them. Indeed, the old theory cannot be admitted that the belligerents have the right to prevent neutrals from profiting by the war. On the contrary, it must be admitted in principle that the law of peace, subsisting in its entirety so far as neutrals are concerned, binds the belligerents to regulate their conduct in conformity with it.

#### DUTIES OF NEUTRAL STATES

**1807.** A neutral state must:

(a) Abstain faithfully and completely from taking part in the war and do nothing which, directly or indirectly, may contribute to render either belligerent stronger; in general, abstain from any act whatever having the character of assistance to one of the belligerents for war purposes; and abstain impartially from lending assistance to either belligerent.

(b) Neither permit nor tolerate either belligerent, on the territory of the state or its dependencies, to undertake any operation of war or accomplish any act with respect to the war;

(c) Undertake by its laws to compel all persons subject to its jurisdiction to respect the rules of neutrality and the duties arising therefrom;

(d) Undertake to enforce its criminal laws to the end that persons subject to its jurisdiction may not violate with impunity the rules of neutrality and the resulting duties;

(e) Prevent, by all means at its disposal and with due diligence, any eventual injury which may be done to either belligerent from a violation of its neutrality by private individuals;

The obligations arising from neutrality do not merely concern the government of the state which has made a declaration of neutrality, so as to involve its direct responsibility in case of violation, but concerns likewise the citizens of that state. These citizens, indeed, are bound individually not to violate the duties of neutrality by undertaking hostile acts contrary to the obligations assumed by their government when declaring its neutrality.

Yet, hostile acts accomplished by citizens of the state do not always involve the responsibility of the government. The indirect responsibility of the state can only arise if it can be considered as having been obliged to prevent the accomplishment of these acts and had voluntarily failed to do what it could and should have done towards preventing them. This is covered by sections c, d and e of our rule.

Compare: Fiore, *Questioni di diritto su casi controversi—Contraversia tra il governo olandese ed il governo inglese*, p. 299.



## ACTS WHICH MAY BE CHARACTERIZED AS ACTS OF HOSTILITY

**1808.** The following shall be deemed acts of hostility:

(a) Assistance given to one of the belligerents by means of armed troops or placing at his disposal ships of war or vessels built and equipped for war, or by giving him a subsidy or loan calculated to aid in the operations of the war;

Assistance shall be deemed an act of hostility, even when furnished with perfect impartiality and equality to both belligerents.

(b) The permission or toleration of the use of its territory by one of the belligerents for the passage of its armies;

The acts contemplated in paragraphs *a* and *b* do not lose their real character as such even if the state by a previous treaty had undertaken to grant assistance or passage.

(c) Permission for or toleration of any operation within its ports or territorial waters by a belligerent war-ship calculated to strengthen its power or augment its armament, or to take in provisions and coal, except in case of urgent necessity, and then not beyond the quantity necessary for the needs of the crew during the time required to reach the nearest home port of the belligerent.

(d) Openly favoring or encouraging the enlistment of recruits within its territory on behalf of one of the belligerents;

(e) Permission for or toleration of a ship of war or privateer of one of the belligerents entering its ports or territorial waters to sell or to place in safety its prizes, except in cases of forcible entry under distress, in which circumstances shelter may be granted, on condition, however, of not taking advantage thereof for purposes of war;

(f) Permission granted to citizens to enlist in belligerent armies, or to accept letters of marque to engage in privateering, or to accept proposals of the belligerent states for fitting out ships of war or for participating in any manner whatever in the fitting out or armament of a privateer.

## ACTS CONSISTENT WITH NEUTRALITY

**1809.** The following shall not be deemed hostile acts or acts inconsistent with neutrality:

(a) The passage of armies through neutral territory, when the

belligerent has crossed it without authorization and the territorial sovereign is powerless to prevent it except by becoming involved in the war;

(b) The enlistment in the belligerent armies of private individuals without authorization of the Government, provided the Government has applied to its citizens the laws in force concerning the legal consequences of enlisting abroad;

(c) Open and impartial commerce in munitions of war carried on by individuals at their own account and risk, without direct or indirect encouragement of the Government;

(d) Any act whatever on the part of private individuals, not prohibited by municipal law, which may have been of advantage to one of the belligerents, but which was accomplished on the initiative of a private individual alone without the State having done anything that may have contributed to lessen the individual's risk and to protect him against the laws of war.

In order to make clear the principles above mentioned, it must be observed that no government can be compelled to suspend the operation of municipal laws which permit enlistment abroad, or commerce in arms and munitions of war, loans, subsidies, the formation of relief committees, etc. It is, however, bound to apply those laws so as to eliminate any suspicion of indirect encouragement given to the initiative of individuals and to commercial undertakings which must always be carried out at the risk of the persons engaged therein.

The belligerent always has the right to provide against all the consequences of the acts of individuals, by enforcing against them the laws of war. It is sufficient that the neutral government does not shield its citizens from measures adopted by belligerents and justified by the laws of war and provides for the application by the authorities of all the penalties of its municipal law against certain unlawful acts undertaken by individuals in time of war.

1810. It is no longer to be regarded as contrary to the duties of neutrality to grant permission to the belligerents to transport the sick and the wounded through neutral territory.

#### BELLIGERENTS TAKING REFUGE IN NEUTRAL PORTS OR TERRITORY

1811. It shall not be regarded as contrary to the duties of neutrality to give refuge in neutral ports to belligerent ships compelled to enter on account of stress of weather or of maritime disasters, or to receive on neutral territory soldiers requesting asylum after battle or troops pursued by the enemy who may seek

refuge. These duties of humanity must, however, be accomplished without any indirect prejudice to the interests of the other belligerent and in compliance with the following rules.

**1812.** The neutral government may protect troops which, pursued by the enemy, have taken refuge in its territory. It may likewise do everything required by humanity for the maintenance and lodging of the soldiers, subject to the right to be repaid for the expenses incurred therefor by the State to which the troops belong; but it may not allow them to resume fighting unless they have been disarmed before leaving the neutral territory.

**1813.** The neutral government is bound to subject belligerent ships of war which have sought refuge in its ports on account of stress of weather to the condition of resuming their navigation only after a certain period of time, not less than twenty-four hours, following their arrival. It may permit ships which have been forced to put in for the purpose of repairing damages to make only such repairs as are necessary to render them seaworthy and to resume their voyage without augmenting their armament.

If a belligerent vessel has taken refuge in a neutral port to escape the attack of an enemy, which was pursuing it with superior forces and was certain to capture it, the neutral government could not, without violating the laws of neutrality, allow it to put to sea again in order to continue fighting, but must detain it and permit it to depart only after the commander has given his word to take no further part in the war.

This rule tends to reconcile the duties of humanity with the necessities of war and the rights of neutral states with those of the belligerents. In regard to the ship which has entered a neutral port owing to stress of weather, it should be considered sufficient to prevent it from taking any military armament and to detain it at least twenty-four hours, in order to prevent its entrance into the neutral port from constituting an operation of war. As to the ship which has sought shelter therein in consequence of a battle and has availed itself of the protection of the neutral state in order to escape the superior forces of the enemy pursuing it, and has thus avoided the impending danger of capture, it must be deemed indispensable not to permit it to put to sea again except on condition of taking no further part in the war. A neutral which would not only prevent a belligerent from pursuing and capturing an enemy ship in neutral territorial waters, but would allow such ship again to take an active part in the war would be furnishing a veritable military assistance to one of the belligerents.

Compare, for the provisions of Italian legislation on this subject, the note under rule 1826.

## PRISONERS LANDED AND PRIZES ABANDONED IN NEUTRAL PORTS

1814. A neutral state should not permit a ship of war which by unavoidable circumstances is compelled to enter one of its ports to land prisoners of war therein unless they are set free and permitted freely to depart.

1815. Should a belligerent vessel, owing to unavoidable causes, be compelled to abandon in a neutral port or in neutral territory prizes which it has captured, the neutral government ought to provide for the custody of the goods so abandoned and place them at the disposal of their owners, unless the goods are contraband of war. In that case, the goods would have to be kept in custody until the end of the war and should only be placed at the disposal of their owners or of the captors in conformity with the decision of the International Prize Court.

## DILIGENCE REQUIRED IN THE OBSERVANCE OF THE DUTIES OF NEUTRALITY

1816. Any government of a neutral state which has not displayed perfect fairness and good faith in the strict observance of the duties of neutrality, and that due diligence which is required by the nature of things and the necessities of war shall be held responsible for any consequences of its failure to exercise due diligence.

1817. The diligence required of any government shall be determined with due regard to the circumstances which might render more or less imminent the danger of violating the duties of neutrality and the possibility of preventing injury to one or other of the belligerents.

Its responsibility would be in direct proportion to the means at its disposal to prevent the violation or to avoid or diminish the resulting injury to a belligerent, and the degree of diligence displayed in adopting them.

(Compare rules 604 *et seq.*)

## FAULTS RESULTING FROM THE LACK OF DILIGENCE

1818. Ignorance on the part of a government of an act accomplished or planned by private individuals with the intention of vio-

lating the duties of neutrality, cannot bar its liability for lack of diligence on its part whenever such ignorance may, under the circumstances, be considered as malevolent or grossly negligent.

1819. No neutral government shall be deemed guilty of a want of due diligence for not having adopted extraordinary precautions for the protection of the interests of the belligerents by limiting the liberty of its citizens beyond the bounds permitted by the institutions of the country. Nevertheless, the present powerlessness of a neutral government in preventing a violation of its duties of neutrality shall not be sufficient to bar its liability, whenever it is shown to have failed in due time properly to provide the legal means calculated to prevent private individuals from violating the duties of neutrality.

#### ARBITRAL AWARD ON THE QUESTION OF DILIGENCE

1820. The determination of the degree of diligence which a government is bound to observe in the faithful discharge of its duties of neutrality is an unusually complex question which must be referred to a tribunal of arbitration.

For a further discussion of these rules, see Fiore: *Trattato di diritto internazionale pubblico*, III, 3d ed., §§ 1672 *et seq.*, p. 384.

#### DUTIES OF BELLIGERENTS TOWARD NEUTRALS

1821. The belligerents are bound to consider all states which, at the outbreak of war, have made a declaration of neutrality or have fulfilled the conditions required to be legally deemed neutrals, as enjoying all the rights of neutrals in time of peace, subject to the restrictions imposed in accordance with the "common" law in case of war.

They must also abstain from applying the laws of war to the citizens of neutral states not engaging in hostile acts, and consider them under the protection of the law in force in time of peace whenever they honestly and in good faith perform the duties of neutrality and do not infringe the laws and usages of war.

1822. The belligerents shall have no right by virtue of the exceptional law of war to capture neutral goods on board an enemy ship, except in case of contraband of war. (See rules 1870 *et seq.*)

**1823.** It shall not be permissible to treat a neutral vessel as an enemy or commit against it any act of hostility, when, by its papers, the vessel is able to establish its legal status as a neutral, and when there shall be no well-founded or reasonable ground to suspect the genuineness of the documents produced, or to raise the presumption that the vessel has forfeited its rights as a neutral.

**1824.** In principle, it should be deemed unlawful to capture enemy goods on board a neutral ship, unless they be contraband of war, even with respect to states which did not sign the treaty of 1856.

**1825.** Capturing an enemy ship in neutral territorial waters shall likewise be deemed unlawful, and the belligerent shall be bound to recognize the right of the neutral state to request that the prize be set free. Cf. Rule 1803.

**1826.** The belligerents have no right in time of war to modify the rules governing peaceful commerce, but it is their duty to allow the citizens of neutral states to navigate their vessels and conduct commercial relations with perfect freedom and security under the protection of the "common" law in force in time of peace and of treaties, subject only to the restrictions arising out of effective blockade and the prohibition of carrying contraband of war.

The Italian legislature has determined the rights and duties of neutrality by certain provisions of the Merchant Marine Code of October 24, 1877, Chapter III, Title IV, Part I. These provisions read:

**ART. 246.**—In the event of war between Powers with which Italy remains neutral, no privateers or ships of war shall be received in the ports, roadsteads or the shores of the State, except owing to stress of weather.

They shall be required to leave as soon as the danger is over.

No belligerent war-vessel or privateer shall be permitted to sojourn more than twenty-four hours in a port, in a roadstead or on the shores of the State or in adjacent waters, even if it should come alone, unless it is compelled to put in under stress of weather, damage or lack of provisions necessary for the security of navigation.

In no case shall they be allowed, in the ports, in the roadsteads or on the shores of the State, to sell, exchange, barter or give away captured goods.

**ART. 247.**—The vessels of war of a friendly Power, even belligerent, shall be allowed to enter and sojourn in the ports, in the roadsteads and on the shores of the State, provided their mission is exclusively scientific.

**ART. 248.**—In no case shall a belligerent vessel be permitted to make use of an Italian port for the purposes of war, or to obtain a supply of arms or munitions.

It shall not be permitted, under pretext of repairs, to undertake works likely to increase in any way its military power.

**ART. 249.**—Vessels of war and privateers shall only be supplied with the

provisions and commodities and means of repair necessary for the subsistence of their crew and the security of their navigation.

Belligerent war-vessels or privateers wishing to take in coal shall be allowed to do so only within twenty-four hours after their arrival.

ART. 250.—When war vessels, privateers or merchant ships of the two belligerents shall simultaneously be in a port, a roadstead or on the coast of the State, there must be an interval of at least twenty-four hours between the departure of any vessel of one belligerent and the departure of any vessel of the other belligerent.

This interval may be increased according to circumstances by the maritime authorities of the place.

ART. 251.—Prize capture and any act of hostility between vessels of belligerent nations in territorial waters and in the sea adjacent to the islands of the State shall constitute a violation of national territory.

#### RIGHTS AND DUTIES OF NEUTRALITY ACCORDING TO THE HAGUE CONVENTION OF 1907

1827. The states represented at the Hague Conference of 1907 and those which shall subsequently adhere to the General Act shall be bound to recognize the compulsory legal force of the conventional rules, adopted in common agreement, concerning the rights and duties of neutrality during war on land and on sea, provided the states which have signed the General Act are parties to the war, and subject to the reservations made by individual signatory states.

The rules herein mentioned are founded in the Vth and in the XIIIth conventions of the General Act of October 18, 1907. The former was signed without reservation by all the states, except the Argentine Republic and Great Britain, which alone made reservations. The latter, signed without reservations by the majority of the states, was signed with reservations by Germany, the Dominican Republic, Great Britain, Japan, Persia, Siam and Turkey. The text of this Convention is as follows:

# WAR ON LAND (CONVENTION V)

## CHAPTER I

### RIGHTS AND DUTIES OF NEUTRAL POWERS

Art. 1. The territory of neutral Powers is inviolable.

Art. 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Art. 3. Belligerents are likewise forbidden to—

(a) Erect on territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

(b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

Art. 4. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

Art. 5. A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.

It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.

Art. 6. The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Art. 7. A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.

Art. 8. A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.



Art. 9. Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents.

A neutral Power must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

Art. 10. The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.

## CHAPTER II

### BELLIGERENTS INTERNED AND WOUNDED TENDED IN NEUTRAL TERRITORY

Art. 11. A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

Art. 12. In the absence of a special convention to the contrary, the neutral Power shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace the expenses caused by internment shall be made good.

Art. 13. A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain on its territory it may assign them a place of residence.

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.

Art. 14. A neutral Power may authorize the passage through its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel or war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose.

The sick or wounded brought under these conditions into neutral

territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral Power so as to ensure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

Art. 15. The Geneva Convention applies to sick and wounded interned in neutral territory.

### CHAPTER III

#### NEUTRAL PERSONS

Art. 16. The nationals of a State which is not taking part in the war are considered as neutrals.

Art. 17. A neutral cannot avail himself of his neutrality:

- (a) If he commits hostile acts against a belligerent;
- (b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

Art. 18. The following acts shall not be considered as committed in favor of one belligerent in the sense of Article 17, letter (b):

- (a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories;
- (b) Services rendered in matters of police or civil administration.

### CHAPTER IV

#### RAILWAY MATERIAL

Art. 19. Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of companies or private persons, and recognizable as such, shall not be

requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral Power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent Power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.

## NAVAL WAR (CONVENTION XIII)

Art. 1. Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

Art. 2. Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

Art. 3. When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.

Art. 4. A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters.

Art. 5. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

Art. 6. The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.

Art. 7. A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or in general, of anything which could be of use to an army or fleet.

Art. 8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same

vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.

Art. 9. A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes.

Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

Art. 10. The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents.

Art. 11. A neutral Power may allow belligerent war-ships to employ its licensed pilots.

Art. 12. In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present convention.

Art. 13. If a Power which has been informed of the outbreak of hostilities learns that a belligerent war-ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.

Art. 14. A belligerent war-ship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to war-ships devoted exclusively to religious, scientific, or philanthropic purposes.

Art. 15. In the absence of special provisions to the contrary in the legislation of a neutral Power, the maximum number of war-ships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.

Art. 16. When war-ships belonging to both belligerents are

present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent war-ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.

Art. 17. In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

Art. 18. Belligerent war-ships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

Art. 19. Belligerent war-ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

Art. 20. Belligerent war-ships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.

Art. 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order

it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Art. 22. A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

Art. 23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.

Art. 24. If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

Art. 25. A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.

Art. 26. The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the articles relating thereto.

Art. 27. The contracting Powers shall communicate to each other in due course all laws, proclamations, and other enactments regulating in their respective countries the status of belligerent

war-ships in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that Government to the other contracting Powers.

Art. 28. The provisions of the present Convention do not apply except to the contracting Powers, and then only if all the belligerents are parties to the convention.



## TITLE XIX

### OF BLOCKADE AND ITS EFFECTS WITH RESPECT TO NEUTRALS

#### BLOCKADE: PLACES WHICH MAY BE SUBJECTED THERETO

**1828.** A blockade is an operation of war consisting in the investment of any portion of the enemy coast effected by means of a naval force for the purpose of cutting off all communication by sea, and maintained by ships in sufficient number really and effectively to prevent, by force, any ship from crossing the line of blockade without running the risk of being hit by the guns of stationary vessels.

**1829.** A belligerent may blockade not only military or fortified ports but also commercial ports, roadsteads, gulfs and any portion of the enemy shore with which he intends to interrupt all communication.

**1830.** According to the general principles of international law and to conventional rules, the mouths of international rivers, straits—even when both shores belong to the enemy state—and interoceanic canals cannot be subjected to blockade.

The purpose of this rule is to establish that, aside from international agreements relating to the neutrality of straits and interoceanic canals, the Suez Canal, for example, the right of a belligerent to blockade such straits and canals and the mouths of international rivers must be considered as forbidden by the principles of the "common" law of nations. Were it otherwise, the result would be that an operation of war directed against the enemy would equally affect neutrals entitled to employ these means of communication for peaceful purposes.

**1831.** A belligerent shall have no right to subject to blockade his own ports and to apply thereto the laws of war concerning the blockade of enemy ports. He shall have the right, however, during war, to decree the closing of one or more of his ports and to use force to prevent neutral ships from entering them.

If, however, national ports have fallen into the hands of the enemy, the belligerent may, during their military occupation by

the enemy, effect their blockade under the normal conditions of making it effective and obligatory in conformity with the following rules governing the blockade of hostile ports.

#### WHEN IS BLOCKADE LEGALLY ESTABLISHED?

**1832.** A blockade can only be considered as existing *de facto* when it is real and effective. It can be so regarded only when all the ships composing the blockading squadron are stationed permanently so as to form a semi-circle before the blockaded port or coast, and to make it, in all probabilities, impossible for a ship to pass the line of blockade without exposing itself to grave dangers and to imminent peril while passing under the fire of guns.

**1833.** As an operation of war, a blockade shall be deemed a warrant to confer upon the belligerent the rights flowing from it according to the laws and customs of war—not only as regards the enemy, but even as regards neutrals, with power in case of violation, to punish them—on condition, however, that it shall be real and effective under the provisions of the preceding rule.

The foregoing rules, as we have formulated them, tend to dissipate any uncertainty as to the existence of the blockade and to establish the fact that it is to be considered as legally existing only after the belligerent has really invested the port, roadstead, or coast of the enemy, by stationing before it a number of ships forming a veritable semi-circle, in order to prevent any vessel from passing through the line of blockade without liability to being fired upon by stationary ships.

**1834.** The blockade shall not cease to be real and effective owing to the fact that one or more ships have succeeded, by taking great risks, in running the blockade; it shall be sufficient, in order that it may be so considered, that this line may not be *normally* crossed without danger of being hit by the guns of the stationary ships.

This rule tends to avoid all exaggeration as to the reality and effectiveness of the blockade. If the fact that one or more ships have been able, *by way of exception only*, to force the blockade line should suffice to annul its legal existence, the result would be that the most effective blockade could be disregarded. It often happens, indeed, that steamships of great speed, commanded by daring captains, escape the surveillance of the blockading squadron, owing to the darkness and to weather conditions. This does not modify the effectiveness of the blockade. But the case would be different should ships repeatedly cross the line without danger.

## BLOCKADE NOTIFIED ONLY THROUGH DIPLOMATIC CHANNELS

**1835.** A blockade, declared and notified only through diplomatic channels, in accordance with rule 1837 shall only be considered as in force and binding upon neutrals, if real and effective, notwithstanding the fact that the belligerent who has proclaimed and notified it has a naval force sufficient to enforce it effectively.

This rule tends to exclude any system of blockade which is not real and effective in accordance with the foregoing rules. In order to legitimate what is known as "paper blockade," or fictitious blockade, or blockade by diplomatic notification, it was contended that the belligerent did not need to have ships stationed permanently to enforce it; but that it should be sufficient for him to have notified the blockade and to have a fleet adequate to enforce it and cause it to be respected. This is how the system of "cruiser blockade" was introduced. Nevertheless, under the rule established by the Declaration signed at Paris in 1856, no belligerent can avail himself of the rights of war resulting from a blockade unless he in fact occupies the littoral waters of the blockaded coasts by a permanent fleet, which is in fact capable of preventing all communication with the coasts.

## TEMPORARY SUSPENSION OF THE INVESTMENT

**1836.** Temporary suspension of the investment for any cause whatever suspends the application of the laws of war consequent upon blockade for the period during which the real and effective investment ceases to exist.

The object of this rule is completely to dismiss the idea that a belligerent may impose the laws of blockade and apply them without a real and effective occupation. In view of the fact that everything depends upon such occupation, it naturally follows that when it comes to an end, the application of the laws of blockade must cease; that when it is suspended, the application of these laws must likewise be suspended. Ships bound for a blockaded coast which do not find before them the blockading fleet, cannot be compelled to ascertain whether the investment has ceased, through the final cessation of the blockade or for any other cause. If the blockade does not exist in fact, the laws relating thereto cannot be applied.

## DIPLOMATIC NOTIFICATION OF THE BLOCKADE

**1837.** A belligerent intending to blockade a port or a coast must give public notice of his intention to do so through the channels of diplomacy, indicate the port and coast he intends to blockade and state the day on which the investment is to begin,

allowing neutral ships a reasonable time to complete commercial transactions in progress in the blockaded places and subsequently to leave them with full security.

The omission of such diplomatic notification shall not suffice to deprive of its legality a blockade which is in fact real and effective and has been specially notified under the provisions of the following rule.

#### SPECIAL NOTIFICATION OF THE BLOCKADE

**1838.** The special notification of a blockade consists in its official declaration made by an officer of the blockading squadron to the captain or master of a neutral ship bound for the blockaded coast or port. This declaration must be transcribed in the ship's log, with mention of the day and hour when made and determination of the limits of the blockade, indicating both the latitude and longitude.

**1839.** A blockade shall not be considered as in force with all its legal effects as to a ship bound for or wishing to leave the blockaded territory, after until the special notification and from the time it was entered in the ship's log.

#### TIME LIMIT FOR DEPARTING FROM THE BLOCKADED PLACE

**1840.** The commander of a squadron who wishes to establish a blockade is always bound, whenever he can do so without serious impairment of military operations, to notify it to the representatives of neutral states residing within the blockaded zone, making known to them the day on which the blockade is to commence and the time limit allowed to neutral ships to depart from the blockaded place.

Such notification may be made to the consuls of neutral states (cf. rule 1845) and the time for departure shall commence from the day such notification shall have been made.

**1841.** If, under the treaties concluded between the blockading belligerent and the national state of the merchant ships anchored in the blockaded port, a period of time has been fixed for the departure of vessels in case of blockade, such period of time so stipulated shall only begin to run from the day when the commence-

ment of the blockade shall have been notified to the consul residing in the blockaded port.

In the absence of an official notice to the consuls of neutral states, the time limit as stipulated in the treaties shall begin from the day the blockade shall have been notified through diplomatic channels. (Rule 1837.)

#### DUTIES OF NEUTRALS IN CASE OF BLOCKADE

**1842.** Neutral ships intending to observe the duties of neutrality must recognize all the effects flowing from the blockade in accordance with the laws of war, when all the conditions required for the effectiveness of the blockade have been fulfilled and when it has been properly notified in conformity with the foregoing rules; they shall absolutely refrain from sailing for the blockaded port or coast or from leaving it by forcing the line of investment, under pain of liability, in case of violation, to the penalties provided by international law, and mentioned in rules 1848-1849.

**1843.** The law of blockade shall be deemed violated only when a ship, to which the special notice shall have been communicated as prescribed in rule 1838, shall attempt to reach the blockaded coast or port or to leave it. (Compare rule 1846.)

#### RIGHTS OF NEUTRALS IN CASE OF BLOCKADE

**1844.** A neutral ship, notwithstanding the diplomatic notification of the blockade by a belligerent and announced by its Government, shall be entitled to sail for a blockaded port, and may not be considered guilty of violating the blockade unless, having received the special notification referred to in rule 1838, it has attempted to force or has forced the line of real and effective blockade. (Compare rule 1846.)

[This is the continental, but not the Anglo-American rule.—Transl.]

**1845.** The official communication conveyed to the consuls of neutral states residing in the blockaded countries shall not be equivalent to the special notice that must be given to merchant vessels of these states. If one of these vessels, finding itself in a blockaded port, should attempt to leave it after the blockade has

been established in a real and effective manner, it shall not be deemed guilty of violating the blockade unless it had been reached by the special notice contemplated in rule 1838.

Such ship, as well as any vessel which may attempt to enter the blockaded port after special notice, would be subject to the laws of war governing blockade and to the penalties provided by those laws.

**1846.** The laws of war governing blockade shall not apply to neutral vessels leaving blockaded ports in ballast, or which, having taken a cargo on board before the commencement of the blockade, shall cross the line of blockade within the time fixed by the commander for leaving, or within the time stipulated in treaties, observing to that end the provisions of rules 1840 and 1841.

#### APPLICATION OF THE RULES OF BLOCKADE TO ENEMY MERCHANT VESSELS

**1847.** The foregoing rules shall be applicable likewise to enemy merchant vessels regarded as violating the blockade, provided enemy private property had been declared inviolable during maritime war, thus abrogating the exceptional rule now in force, which permits their capture as ships of the enemy.

#### PENALTIES

**1848.** A belligerent has the right to seize any merchant vessel, whoever its owner, which, having been specially notified not to cross the blockading line—as provided by rule 1838—has attempted to violate or has violated the blockade and was caught in the act.

**1849.** He has the right likewise to confiscate the ship and the cargo, whoever the owner and whatever its nature may be, when a competent court has decided that the ship seized was actually guilty of violating the blockade or of attempting its violation at the time it was caught in the act and captured.

## TITLE XX <sup>1</sup>

### CONTRABAND OF WAR

**1850.** Contraband of war is the transport by sea, addressed to or destined for the enemy, of any kind of arms, machines, engines, or any other articles which may be considered as designed for use in land or naval war and which, as such, must be regarded as contraband of war under the customary law of nations or conventional law.

**1851.** The belligerent has the right to forbid the transport, addressed to or destined for the enemy, of goods likely to be of service in war; to consider the transport of these goods by neutral ships as an act of assistance for the purposes of war quite irreconcilable with the legal status of neutrality and with the duties arising therefrom, and to consider any ship engaged in such traffic as at once deprived of the right to be deemed a neutral, by subjecting it to the penalties applicable under the laws and customs of war to those carrying contraband of war.

#### ARTICLES CONSIDERED CONTRABAND ACCORDING TO THE "COMMON" LAW OF NATIONS

**1852.** Articles of any kind manufactured, prepared and designed for use in war shall be deemed, according to customary law, contraband goods. Such are:

(a) All species of arms designed for attack and defense, whatever their nature;

(b) Munitions of war and likewise all explosive or fulminating material which may take the place of powder, or which, in the progress of science, is likely to be made use of as a means of destruction in time of war;

<sup>1</sup> We reprint here, with a few changes, the rules relating to contraband of war as formulated in the preceding editions of this book and as developed in our other works. See: Fiore, *Diritto internazionale pubblico*, no. 117.

- (c) Articles of equipment and armament for the army and navy;
- (d) War-ships and all kinds of boats likely to be used in war and the constituent parts of such ships and boats, provided that they are, in their present state, manufactured, prepared, and designed so as to be added to the principal structure, of which they are accessories;
- (e) All other articles which, in the progress of military science, are manufactured, prepared, and designed for immediate service in the actual uses of land or naval war;
- (f) Machines and instruments for manufacturing the things above mentioned.

Although considerable differences exist as to the determination of the things which must be considered contraband of war, whose transport to the enemy must be deemed prohibited, it is universally agreed that the articles above enumerated, which are to be considered as manufactured and prepared for use in war, must be regarded as contraband of war. It must, therefore, be considered that they surely constitute contraband according to the customary law of nations.

Italy, in article 216 of the Merchant Marine Code, defines contraband of war as follows: "The following are declared to be contraband of war: Cannon, rifles, carbines, revolvers, pistols, sabers and other firearms and portable arms of all kinds, and in general everything that may, without treatment, serve for immediate naval or land armament."

#### A BELLIGERENT CANNOT EXTEND AS HE PLEASES THE CONCEPTION OF CONTRABAND OF WAR

**1853.** A belligerent is not allowed, through orders, decrees and proclamations promulgated at the outbreak of war, to declare that the transport of certain articles not forbidden by the customary law of nations shall be considered as contraband of war.

If, however, in consequence of such an order or decree, the government of a neutral state has ordered its citizens to abstain from transporting to a belligerent the articles indicated in a decree promulgated by the other belligerent, and has declared that the prohibited transport should be held to be aid or assistance for the purposes of war, the prohibition of the government of the neutral state should be deemed binding upon its citizens.

This could also be established by treaties in conformity with rule 1854, *infra*.

Rule 1853 tends to establish that the true conception of contraband must be considered as fixed universally according to the principles of the "common"



law of nations and that belligerents cannot be allowed to fix it themselves by orders, decrees and proclamations. Some writers, however, have maintained that the belligerents themselves should be allowed to determine which articles may be carried and the articles whose transport ought to be regarded as an act of assistance and subject to the laws of war applicable to the carriage of contraband. We find this doctrine formulated in the international regulations of maritime prizes adopted by the Institute of International Law in 1882, § 30, which reads: "Belligerent governments shall have to determine in advance in each particular war the articles which they will consider as contraband." Should this view be admitted, the result would be that, as the belligerents could determine the prohibition to suit themselves, they could extend it beyond the limits which ought always to be considered as established according to the nature of things and the necessities of war; and thus the liberty of trading freely in time of war as in time of peace, recognized generally as belonging to neutrals (provided they do not by their trade lend direct aid or assistance to the belligerents) would be in fact considerably reduced, since states engaged in war would be allowed at will to characterize as aid and assistance any kind of trade whatever and prohibit it as such. This is the way the great maritime powers have viewed the matter, and it has had as its result the arbitrary restriction of the trade of neutrals, as each of the belligerents enumerated to suit himself the articles which he considered contraband of war and subjected to the laws in suppression of contraband any vessel carrying goods the trading in which he had chosen to prohibit.

We admit that special necessities may, under certain circumstances, justify the increase beyond normal limits of the number of articles, commerce in which should be prohibited. Nevertheless, as no belligerent has the right to assume jurisdiction over all states, it is impossible to admit that he may, with imperative authority, declare forbidden to all neutral states all traffic in articles indicated by him as contraband of war. Otherwise, we would be led to the conclusion that this belligerent could impose upon other Powers a rule in derogation of the "common" law of nations, and subject them in case of violation to all the penalties provided therefor by the customary law of nations. Therefore, if, owing to peculiar circumstances, it should become absolutely necessary to prevent commerce in certain goods, the prohibition proclaimed for this purpose by ordinances or decrees published at the outbreak of war could only become effective as declarations of contraband if the governments of neutral states had recognized the fact that the commerce thus prohibited presented the character of aid and assistance for the purposes of the war and had forbidden their citizens to transport these particular things, by declaring them to be included amongst articles of contraband.

#### CONVENTIONAL CONTRABAND OF WAR

**1854.** The category of articles of contraband may be extended beyond the limits established by the "common" law of nations by virtue of the express stipulations of treaties between the belligerent and other states, and concluded, either previously to or at the outbreak of the war. In such case, the extension of the contraband lists shall be valid only for such states as shall be bound

by treaty, and the prohibition to transport the articles stated shall only be binding upon the citizens of the states that have signed the agreement.

Admitting that the category of the articles regarded as contraband of war may be extended by virtue of a treaty, we infer therefrom that the conventional law thus fixed can only apply to the citizens of the states signatory of such treaty. This, far from disproving, confirms our rule above set forth, by which the determination of contraband of war in conformity with international law and the application of the rules and penalties relating thereto must be considered as fixed according to the customary law of nations and cannot depend upon the pleasure and interests of the belligerents in each particular war. The "common" law, indeed, can not be modified by conventions except as regards entities which may validly bind themselves by treaty.

#### RIGHT OF A BELLIGERENT TO PROHIBIT COMMERCE IN CERTAIN OBJECTS

**1855.** A belligerent may, owing to the necessities of war, prohibit the carriage of certain articles to his enemy and prevent such transport by force, on condition of indemnifying private individuals for any damage arising from such prohibition.

In order to make clear the concept involved in this rule, we must note that it is impossible to deny completely the right of a belligerent in some cases to prevent the delivery to the enemy of certain fixed articles of which he may have a pressing need and whose privation is quite certain to be prejudicial to him and to weaken his power to continue the war. Prohibition and recourse to force for the purpose of making it effective would be justified as any other operation of war, since no one can deny that war is in itself a case of *force majeure* calculated to modify the authority of the principles of the "common" law of nations. There is, in time of war, an ensemble of rights based upon the necessities of attack and defense, and amongst them is the right of forcible expropriation, which takes the form of requisitions, forced contributions, etc. It must be admitted, therefore, that in order to weaken his enemy a belligerent may forbid the shipment to him of certain articles, so as to diminish his power of resistance and prevent him from proceeding with the war.

What he cannot do is to transform the legal nature of his act, by assigning to an act which he is allowed to undertake as an operation of war the character of a right which belongs to a belligerent by customary law, namely, the right to prevent the carriage of contraband of war. He is not, therefore, justified in considering a neutral ship as deprived of the privilege of neutrality by the mere fact that it is transporting to the enemy articles which he has himself classed as contraband, nor in subjecting such ship to the penalties provided for by international law against those who violate the duties of neutrality.

And so, we admit the right of prohibition as based on the necessities of war, deeming the said prohibition to be a case of *force majeure*; and we hold also that the belligerent is bound to indemnify private individuals whose interests

suffer from the seizure *in transitu* of such goods transported for or destined to the enemy. Indeed, such transport cannot be called contraband of war; it is merely liable to be prohibited in the belligerent's exclusive interest.

#### DESTINATION OF THE GOODS AND OF THE SHIP

**1856.** All articles which, in conformity with the foregoing rules, may be called contraband of war are subject to the laws of war which govern their transport, when it appears on clear and conclusive proofs and undoubted circumstances of fact that they are destined to one or the other belligerent, even through a false destination or intermediary consignee.

Contraband goods apparently bound for a neutral port may in reality be bound for a belligerent state. It may happen, indeed, that in reality these goods are to be delivered to a belligerent in the course of the voyage, or are to be landed in a neutral port near the border of the belligerent state in order to be shipped, with less risk, to the territory of that state by another vessel, or to be sent there by land. In such case, it is held that the enemy destination of the contraband articles arises from the principle of the continuity of the voyage. This principle has given rise to long discussions and to various applications for justifying the repression, by penalties, of a carriage or transport considered as contraband, owing to fraud as to the real destination.

Compare Fiore, *Diritto internazionale pubblico*, v. III, §§ 1649 *et seq.*; Fauchille, *La théorie du voyage continu en matière de contrebande de guerre*, in *Revue générale de droit international*, 1907, pp. 298 *et seq.*; Bonfils, no. 1569; Bluntschli rule 835; Kleen, *De la contrebande de guerre*, I, § 95; Holland, *Prize law and Report to the Institute of International Law, Annuaire*, 1898; Oppenheim, § 401.

As enemy destination constitutes the essential characteristic of contraband and as the fraudulent act is only an apparent act devoid of legal efficacy, it must be conceded that, when it is possible to establish clearly and convincingly the real destination of articles considered as contraband, the appearance shall necessarily yield to the reality. In such matters, the difficulty consists in verifying the presumption of fraud.

**1857.** Contraband goods on board a neutral ship may be presumed to be intended for the enemy whenever such ship must, in the course of its voyage, call at an enemy port, although the place of destination is a neutral port, or when, during the voyage, it must cross waters where the hostile fleet or a portion of such fleet is stationed.

Likewise, the destination of the goods may be presumed to be hostile if the ship follows a course different from the normal route in order to reach the port of destination indicated in the ship's papers, or when the ship's papers are found to be forged, simulated or altered.

**1858.** Any neutral ship which has been chartered by one of the belligerents, shall be deemed to have been chartered for a military purpose and as being in the service of the enemy or intended for such service, and, as such, shall be considered contraband of war.

#### FORBIDDEN TRADE ASSIMILATED TO CONTRABAND OF WAR

**1859.** Carriage of goods by sea undertaken in time of war for the account of or destined to the enemy and having the character of military assistance shall be assimilated to contraband of war.

Transporting soldiers, dispatches, fuel, or agents of the belligerents under the conditions specified in the following rules shall be regarded as such contraband.

#### TRANSPORT OF SOLDIERS AND OFFICERS

**1860.** The fact that a ship has voluntarily agreed to transport the officers or soldiers of a belligerent, or persons sent by him for a military purpose or to perform a public service connected with military operations shall be considered an act of military assistance and assimilated to contraband of war.

A neutral ship, compelled by violence or force to transport soldiers or sailors of one or the other belligerent, could not be considered as guilty of a violation of neutrality. For such transport is imputable to a ship only when she has voluntarily consented to undertake it for the belligerent. The transport of an officer or commander even when accomplished voluntarily cannot be charged against a neutral ship, when it is proved that, although it did voluntarily agree to undertake it, it was wholly ignorant of the status of the person or persons carried as passengers. Our rule, therefore, tends to establish that the neutral ship cannot be treated as an enemy unless it has voluntarily and knowingly accomplished the act of military assistance.

#### TRANSPORT OF DISPATCHES

**1861.** It shall be an act assimilated to contraband of war for a ship to have voluntarily agreed to carry the dispatches of a military authority, whoever the addressees may be, or those addressed to a military authority, whoever the senders may be, as well as for a ship to transport from one port to another port of one of the belligerents the dispatches of a public official addressed to another public official of the same state, and also knowingly and volun-

tarily to undertake to carry correspondence for the purposes of war. (Compare rule 1865.)

A condition which seems to us indispensable in considering as an act of hostility the carriage of dispatches, is that in so doing the vessel knowingly wished to assist the belligerent, and that it thus became an enemy just as would any one who attempts to help the belligerent in any way. When the ship carries the dispatches of a military authority it cannot be ignorant of the fact that by so doing it is aiding one of the states engaged in war and thus commits an act of hostility. Its hostile intention cannot be doubted when it voluntarily plays the part of a courier by carrying the dispatches of a public official of the belligerent state addressed to another official of the same country, wherever it may be delivered. As regards any other kind of correspondence, the knowledge of its purpose seems to us an indispensable condition; accordingly, in the second part of our rule we have used the words *knowingly and voluntarily*, because it is only when the neutral ship spontaneously does something advantageous to the belligerent that it becomes an enemy. If it had carried the dispatch in good faith without knowing its origin, and could prove it, its action could not be regarded as an act of hostility.

#### TRANSPORT OF COAL

**1862.** The transport of coal for a belligerent shall be assimilated to contraband of war, if it is intended for the military authorities located in a portion of the territory of the belligerent state or for a ship belonging to the fleet, wherever it is to be delivered.

#### CARRIAGE OF DIPLOMATIC AGENTS

**1863.** The transport of the diplomatic agents of a belligerent state shall not be assimilated to contraband of war.

Nevertheless, in time of civil war, a ship knowingly and voluntarily transporting agents of a revolutionary party which is waging war, may be deemed guilty of an unlawful transport assimilated to contraband of war.

It cannot be held in principle that transporting the agents or commissioners of one of the belligerents may be assimilated to an act of contraband carriage. Yet such action, under certain circumstances, may be regarded as a direct intention to aid and assist in the purposes of the war. If the transport does not bear the true character of an act of hostility and assistance, the fact of transporting cannot be characterized as a hostile act, nor can it be assimilated to contraband of war.

## ARTICLES WHICH CANNOT BE CONSIDERED AS CONTRABAND OF WAR

**1864.** Arms and ammunition on board a neutral ship, which must be considered as intended for its use and defense shall not be included among the articles of contraband of war.

**1865.** The carriage of ordinary correspondence contained in mail bags destined for a hostile port and emanating from a neutral port, and the carriage of dispatches sent to their government by the ministers or consuls of the belligerent state accredited to or residing in a neutral port, shall not be assimilated to contraband of war.

As diplomatic relations between the belligerent states and neutral states are not interrupted in time of war, it must necessarily be admitted that the correspondence of the ministers and consuls residing in the territory of neutral states with their own government may not be interrupted on account of war.

**1866.** The voluntary transport by a neutral ship of citizens of one of the belligerents residing abroad, who at the outbreak of the war have set sail for their home country, even if they may be suspected of returning for the purpose of taking part in the war, shall not be regarded as contraband of war.

Persons who emigrate even for the purpose of enlisting as volunteers in the armies of their country certainly cannot be considered as soldiers, and consequently the fact of transporting them cannot be assimilated to the transport of soldiers forbidden by rule 1860.

## PENALTIES APPLICABLE TO THE TRANSPORT OF CONTRABAND OF WAR

**1867.** The transport of contraband of war, whether undertaken by an enemy ship or by a neutral ship, shall entail the application of the penalties provided under "common" or conventional law for preventing and punishing such unlawful act of assistance in time of war.

Penalties, however, shall only apply to the acts which may be considered contraband of war according to the rules hereinbefore laid down.

**1868.** The penalties designed to prevent the transport of contraband of war cannot have the character and nature of a penalty intended to punish a criminal act but must have the character of measures calculated to insure the right of legitimate defense of a belligerent against his enemy. It is required, therefore, that the

ship be caught in the act, and when the fact is ascertained (i. e., the carriage of contraband of war destined to a belligerent), it is useless to inquire into the intention.

Hence penalties cannot be exaggerated and increased to make the punishment more effective, but must be restricted and limited to whatever is necessary to safeguarding the right of defense.

**1869.** The governments of civilized states must in common agreement adopt international regulations concerning the penalties likely to prevent unlawful acts of military assistance in time of war, so as to avoid all arbitrary acts in so delicate a matter.

So long as such agreement does not exist, penalties can only be justified when conforming to the general principles of international law.

#### PENALTIES ACCORDING TO THE GENERAL PRINCIPLES OF INTERNATIONAL LAW

**1870.** A belligerent has the right to confiscate all goods on board neutral ships, when they constitute contraband of war according to international law.

**1871.** A belligerent may stop and detain a ship which is transporting contraband goods, in so far as this action may be necessary in order to confiscate the goods and transport them to a safe place.

**1872.** The right of prize over a neutral ship carrying contraband may be accorded to a belligerent only when such ship, by reason of the military assistance it is giving to the other belligerent, can be likened to an enemy ship.

It shall be necessary, therefore, that the facts and circumstances be such as to cause the ship to be considered guilty of active participation in the hostilities.

**1873.** Active participation in the hostilities may be regarded as established in the following cases:

(a) When the ship has voluntarily and knowingly undertaken to transport soldiers for a belligerent;

(b) When the ship has been knowingly and voluntarily chartered for the transport of dispatches to the enemy under such circumstances as to cause such transport to be assimilated to an act of contraband of war,

(c) When it has been chartered for the transport of provisions and stores intended for the navy or the army;

- (d) When it is to be placed at the belligerent's disposal;
- (e) When the contraband goods transported constitute the major part of the cargo (three-fourths or at least two-thirds);
- (f) When, suspected of transporting contraband, it has attempted to resist search by the use of force.

The rules we propose are based upon the idea that the exceptional law in force in time of war may give the belligerent the power to prevent, on the part of neutrals, the performance of any act likely to conflict with his interests of legitimate defense. As, however, he cannot assume the attributes of a legislator and the power of compelling everybody to respect his decrees, he can not apply, as a punishment, the most severe penalties for insuring by terror the protection of his interests. To accord to the belligerent a right of jurisdiction over the high seas, or to allow him to characterize as crimes actions which might be detrimental to his *interests* or to grant him the right to subject to the penalties provided by him those who infringe the prohibitions declared by him for the purpose of protecting his interests, would be out of the question. It is impossible, indeed, to admit that in order to render the punishment more effective, the belligerent may make the penalty more severe by confiscating the ship transporting the articles designated by him as contraband on the pretext of intimidating those who might attempt to injure his interests.

The most exact view of this matter and the one most conformable to justice is that the right of the belligerent consists in providing effectively for his defense and in preventing his adversary from resorting to the assistance of neutrals to increase his military power. It follows therefrom that he may seize articles considered as contraband of war, but not the ships transporting them, because the simple act of transportation can be regarded as a commercial transaction.

If all states should agree to assign to contraband carriage the character of an offense against international law and to decide that the ship which may have committed it would be liable to confiscation, the capture of the ship could be justified by reason of the violation of the "common" law proclaimed by the states; but, under present conditions, the belligerent can only exercise the exceptional rights which he has in time of war, considering the object to be attained by means of the hostilities. According to these rights, confiscating the ship which transports contraband is not justifiable.

The case is different when the ship, by its acts, takes an active part in the hostilities, which would occur in the cases contemplated by us. When it performs an act of military assistance serious enough to be regarded as hostile, it is natural to liken it to a merchant ship aligned with warships intended for military operations.

At any rate, it is reasonable to acknowledge simply that a ship which undertakes an unlawful transportation at its own risk and peril should suffer all the consequences thereof. If, consequently, a belligerent interrupts its voyage and compels it to stop; if, in order to bring to a safe place articles of contraband, he compels it to take them to one of his ports, it cannot complain, because it is suffering the consequences of the unlawful act and of the risks it has voluntarily assumed. But when the belligerent has provided for the protection of his own rights, he cannot require anything else of the ship, nor treat it as an enemy ship.

See, for further developments of our doctrine the article published by us in



the *Pandectes françaises* under the word *Contrebande de guerre* and the study on the same subject translated into Spanish and published at Madrid, *Revista de legislación*, 1896.

[With reference to subdivision (e) of rule 1873, it may be said that the rule of the Declaration of London, article 40, and that adopted by the principal maritime countries is that "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo." See, *The Hakan*, L. R. [1916] P. 266.—Transl.]

**1874.** In no case shall the belligerent have the right to confiscate the lawful cargo which happens to be on board a ship transporting contraband.

The owners of the lawful goods shall not be entitled to require of the belligerents any indemnification for the damage incurred by them from the interruption of the voyage or from the seizure of the ship; they may only bring their action for damages against the captain or the shipowner.

Even though the lawful and unlawful cargoes should belong to the same owner, it could not be permissible to pronounce the confiscation of the lawful cargo. Confiscation thus extended would have the character of a veritable penalty, which is inadmissible, since, as we have already shown, confiscation in case of contraband of war must be restricted within the bounds created by the law of war. It may merely be conceded that when a belligerent has the right to detain a ship which is transporting contraband or to confiscate it under the exceptional circumstances hereinbefore indicated, he can interrupt the ship's voyage and that, when thus exercising a legitimate right, he cannot be held to repair the damage arising from the exercise of such right. The captain or the ship-owner is to be held responsible for the damages arising from the interruption of the voyage, according to the principles of "common" law relating to the transportation contract, which principles determine the responsibility of these two persons towards the owner of the goods for damages which, in the course of navigation, have been incurred by him through the fault of the person managing the ship.

**1875.** It is the duty of the civilized states which have signed the Declaration of Paris of 1856, or which have adhered thereto, to eliminate all uncertainty as to the rules of maritime law in time of war, by fixing in common agreement the articles to be regarded as contraband of war, and by providing penalties for the purpose of insuring the protection of the belligerent's right to prevent unlawful transportation in time of war.

[This was apparently written before the Declaration of London was adopted in 1909; its failure of ratification and its arbitrary disavowal and disregard by some of the leading belligerents in the European War have, of course, left it without effect as positive law.—Transl.]

## TITLE XX

### OF THE RIGHT OF VISIT

#### CONCEPT AND NATURE OF THE RIGHT OF VISIT

**1876.** The right of visit consists in the right of a belligerent, in time of war, to compel any merchant ship encountered within his own territorial waters, within those of his allies, or on the high seas, to stop in order to verify the legal status and the nature of the ship's cargo.

This right may be exercised by the commanders of ships of war of the belligerent, as well as by those of duly commissioned privateers, should the belligerent admit privateering.

**1877.** The right of visit must be considered as an exceptional right recognized in time of war by reason of military necessity. It must, consequently, be exercised with the just restrictions incidental to the nature of the case and the object in view, and shall not be deemed legitimate and proper when the person exercising it has no serious reason for ascertaining the status of the ship and the nature of its cargo.

This rule tends to establish that, although in principle the right of visit on the part of a belligerent cannot be limited, yet it must not be resorted to except in the places and circumstances likely to justify the belligerent's present interest in ascertaining the nationality of the ship met on the high seas or in his territorial waters, or the nature of the cargo on board.

#### WHEN MAY THE RIGHT OF VISIT BE EXERCISED

**1878.** Visit may be undertaken wherever any other war operation is allowed. It cannot occur in neutral territorial waters without violation of the rights of neutral states (compare rule 1802), but may be exercised in the territorial waters of an allied state waging war on the side of the belligerent.

## SHIPS EXEMPT FROM VISIT

1879. A belligerent shall not have the right to subject to visit:

(a) Ships of war of a neutral state, nor those which belong in any capacity to the navy of that state;

(b) Mail steamers, carrying mail for a neutral government, whose flag they are flying, when the government agent on board declares in writing that the vessel is not transporting for the enemy either soldiers, dispatches, contraband of war or articles assimilated to such contraband.

## CONVOYED SHIPS

1880. Convoyed merchant ships escorted by a war vessel are exempt from visit, provided her commander gives the name of every ship composing the convoy placed under his charge and declares that there is no contraband of war nor any article assimilated thereto being transported for the account of or bound for the enemy.

The declaration shall be made by the commander of the convoy on his word of honor and mention of it shall be made in the ship's log.

Ships adhering to the convoy cannot claim privileged treatment unless they fulfill the conditions required in order to be lawfully regarded as belonging to the convoy.

1881. Every government must regulate the organization of maritime convoys by means of laws calculated to safeguard the rights of the belligerents and the necessities of war, and especially to enjoin the commanders of escorting vessels not to receive any ship in the convoy until its papers have been carefully examined and it has been ascertained that it is not carrying contraband of war.

Strict service regulations in that matter must be considered as an indispensable condition for the exemption of the ships of the convoy from visit and search.

The Austrian regulations contain numerous detailed provisions concerning the formation and direction of convoys, as do also the Prussian regulations. The armed neutrality of the Northern Powers in 1800 fixed, by regulations, the conditions required for exempting convoys from visit. Other rules have been established in treaties, e. g., in that of June 17, 1801, between Great Britain and Russia (art. IV). Compare: Perels, *op. cit.*, § 56.

## VISIT OF CONVOYED SHIPS

**1882.** Visiting convoyed ships shall be deemed legitimate:

(a) If the service regulations do not properly permit the commander of the war vessel escorting the convoy to make a solemn declaration as to the nationality of the ships and the destination of the cargo;

(b) If the commander has refused to make the required declaration, or has made it in an incomplete and unsatisfactory manner; or if circumstances are such as to arouse the suspicion that he is taking undue advantage of his position; or if, finally, serious reasons exist for suspecting that he is not acting in good faith.

**1883.** Should a convoyed ship be properly subjected to visit and search, the actual proceedings connected with the search might, according to circumstances, be vested in the commander of the escorting ship himself; or he could be admitted to attend it personally or to delegate an officer for this purpose.

## METHOD OF PROCEDURE IN CASE OF VISIT AND SEARCH

**1884.** Any war-vessel of the belligerent state, which is in waters where it can proceed to undertake visit and search and wishes to order a merchant ship to stop for the purpose of inquiring into its nationality, must hoist the national flag and fire a gun.

The merchant ship must answer the signal by flying its own flag and by stopping at once.

**1885.** The commander of the war-ship must in turn stop at a convenient distance to be able, without danger, having regard to the condition of the sea and wind, to send a ship's boat with an officer and two or three men in order to proceed with the visit.

**1886.** The captain of the merchant ship is bound to present the ship's papers, especially the certificate of nationality, the muster-roll and all the documents likely to disclose the nature and destination of the cargo.

When the officer who has examined these documents finds them to be in order and has no reason to suspect their genuineness, the visit must be considered as ended. After mention of that formality in the ship's papers, the ship is permitted to resume her voyage undisturbed.

## SEARCH AND EXAMINATION

**1887.** If the ship's papers are not perfectly regular and if serious reasons exist for questioning the genuineness of these documents, search and examination may be conducted for the purpose of ascertaining whether other documents or suspicious goods are on board.

The captain cannot object to this. In the event of his refusing, the search and examination may be undertaken by force. Nevertheless, the officer of the war-ship must always act with the greatest moderation and refrain from abusing his right; he must limit the search to the matters concerning which there exists a more or less well-founded suspicion, and ordinarily he should request the captain of the ship to open all closed boxes and lockers.

**1888.** Serious grounds for suspicion shall be deemed to exist:

(a) If the ship has not stopped at once and heaved to on hearing the gun of the war vessel;

(b) If it does not possess all the papers which it ought to have, even if they are alleged to have fallen overboard or have been destroyed during the voyage for any reason whatsoever;

(c) If the papers, while regular, appear to have been altered or counterfeited;

(d) If the attitude of the commander and crew is such as to arouse suspicion of irregularity;

(e) If the vessel is navigating under a false flag.

**1889.** In the cases specified and in any other where, owing to peculiar circumstances, serious ground for suspicion might exist, the search could be extended, by compelling the captain of the ship to open the compartments, closets, and lockers. This examination could not, however, go so far as to justify the opening or breaking open of boxes, casks, and closets, on the pretext of looking for papers or suspicious goods.

Such acts could only be justified in case the captain has objected to the search of sealed boxes suspected of containing the ship's papers or contraband of war.

## SEIZURE OF THE VISITED SHIP

**1890.** Should it appear from the visit and search that the ship stopped is open to the charge of violating the duties of neutrality,

the belligerent would have the right to seize it, in accordance with the rules of procedure set forth in the following title.

1891. Seizure may likewise be made if the ship stopped shall be unable, by its papers, to prove its status as a neutral ship, provided, of course, the belligerents resort to the exceptional right of seizure of private enemy property.

Compare, so far as regards the right of seizure and the procedure relating thereto, the important paper of M. Bulmerincq, *Prises maritimes*, Report to the Institute of International Law, published in *Revue de droit international et de législation comparée*, v. X, XI, XII and XIII.

## TITLE XXII

### OF THE RIGHT OF CAPTURE IN TIME OF NAVAL WAR <sup>1</sup>

#### SEIZURE OF SHIP AND CARGO

**1892.** The seizure of ships or of the cargo on board must be considered as an exceptional act, justifiable by the necessities of the defense. It consists in the right of a belligerent to take possession of an enemy merchant ship or of the cargo on board, when, according to the laws of war, he is permitted to appropriate the ship or cargo or to prevent its arriving at its destination.

#### WHEN AND BY WHOM SEIZURE MAY BE MADE

**1893.** A seizure shall be deemed lawful only when made by a war-vessel or by a vessel which, in conformity with the laws of war, belongs to the military forces of the belligerent.

It shall be considered valid only when the legal formalities of procedure laid down by international law, or arising from treaties, are observed.

**1894.** A seizure is presumed to be made by a belligerent for the

<sup>1</sup> We reprint the rules relating to the right of capture as we had formulated them in the preceding editions of the present work, under nos. 1485-1544 of the 2d edition (1898) and of the 3d edition (1900). We also append the rules adopted by the Second Hague Conference of 1907 which serve to give more authority to our rules, since they are substantially similar to them.

Our conception as to the necessity of constituting an international court to have cognizance of prize cases was set forth as early as the time we published our first work on international law, under the title of *Nuovo Diritto internazionale* (Milan, 1865).

In that work, we held that the sovereign of the captor could not assume jurisdiction either as regards the captured ship or its crew, and therefore that the judgment of his court could not be regarded as final with respect to the captured ship; that the belligerent could refer his agents who had made the seizure to the decisions of his courts, in order to determine their conduct and decide whether the responsibility should be assumed (p. 553; French translation of Pradier-Fodéré, v. 2, p. 526).

We subsequently elaborated our ideas: See Pasquale Fiore, *Trattato di diritto internazionale*, 2d ed., 1884. § 1963; 3d ed., 1891, § 1770.

purpose of protecting his interests and of meeting the requirements of war. It shall be considered as made under his responsibility and as giving rise to damages, if it is subsequently held by a competent court to have been made arbitrarily without cause or in violation of the laws and customs of war.

**1895.** A belligerent may seize any enemy merchant ship, or one suspected of being an enemy, whenever the exceptional right of confiscating the private property of the enemy in time of war is admitted.

He shall have the right, furthermore, to seize a neutral merchant ship or goods belonging to neutrals, whenever he shall have good reason to consider these things as subject to confiscation under the law of war, or when he shall be able to avail himself of the right of preventing these things from reaching their destination. In all these cases, he shall act upon his own responsibility.

#### FORMALITIES OF SEIZURE ACCORDING TO THE "COMMON" LAW OF NATIONS

**1896.** The commander of a war-vessel or of a privateer, properly commissioned, who wishes to undertake a seizure, must draw up a report mentioning the legal status of the ship and cargo, at the time, day, and date the seizure took place, the latitude and longitude of the place where the ship was captured, and the circumstances which brought about the seizure.

**1897.** The commander must draw up a descriptive inventory of all the documents and papers on board, noting the papers missing, and making mention of the whole in a document signed by himself and by the captain of the seized ship. All these documents, together with all writings and letters found on board shall be placed together under cover, with the seals of the commander and of the captain of the seized ship affixed thereto.

All closets and lockers, furthermore, must be locked and on them shall be placed the respective seals of the commander and the captain.

The inventory of the cargo and the list of the members of the crew and of all on board must likewise be made out.

**1898.** A record shall be kept of each of these proceedings, to be signed by the commander and the captain. These acts must be



considered as properly done in the interest both of the captor and of the prize.

**1899.** The commander of a belligerent ship cannot refuse to enter in the record any circumstance of fact on request of the captain of the seized ship, or to comply with all the additional formalities requested by the captain in the drawing up of the inventory and the affixing of the seals, even if he deems these formalities useless.

#### PRESERVATION OF THINGS CAPTURED

**1900.** The captor must, if possible, preserve things captured in their present condition, and neither change nor destroy them, except in case of grave and urgent necessity duly established and recognized.

If, however, the cargo should consist of things likely to deteriorate easily or already damaged, the commander of the war-ship could take any measures best calculated to preserve them, but always with the consent of the captain of the prize and in his presence, or in the presence of the national consul of the captain. Should it be necessary to sell part of the cargo, he could do so, requesting, as far as possible, the assistance of the consul.

#### WHEN MAY THE CAPTURED SHIP BE DESTROYED

**1901.** The commander of the war-ship cannot in principle consider himself authorized to destroy or sink the captured ship. He may, however, do so on his own responsibility (see rule 1940):

1st. When the condition of the sea or of the captured ship will not permit of its remaining afloat;

2d. When the ship, owing to its bad condition or inferior motive power, is incapable of following the war-vessel, and may not, without serious danger, be towed by the latter;

3d. When, on enemy war-ships approaching, it becomes impossible for the commander to keep the captured ship without giving up his freedom of movement and running the risk of its being retaken by the other belligerent;

4th. When it is not possible to send aboard the captured ship a prize crew sufficient to insure its custody without too greatly

reducing the crew necessary for the manning and security of the war-vessel;

5th. When the taking of the captured ship into one of the ports of the belligerent may interfere with the military operations in which the war-ship is engaged.

**1902.** In all the cases contemplated in the foregoing rule, the commander shall draw up a detailed report signed by two officers of the ship, in which shall be stated the circumstances which led to the destruction of the captured ship and the grounds on which the commander may have ordered it. This report shall be recorded in the ship's log and forwarded to the superior naval authorities in a copy signed by the commander.

In case of destruction of the prize, the commander is not only responsible to the owner of the ship and of the cargo as stated under rule 1940, but also to his own government. Furthermore, he may be liable to penalties provided by the military penal code which punishes in time of war acts of destruction not justified by actual necessities. (Compare rules 1484, 1530 *et seq.*)

**1903.** The commander who has ordered the destruction of the captured ship must always transfer to his vessel and place in safety all persons on board, all the papers and documents under cover and seal (see rule 1897), a portion of the cargo which brought about the seizure, and, as far as possible, the articles of greatest value which may be considered as exempt from confiscation and as belonging to their owners.

#### PERSONS ON BOARD

**1904.** The commander of the war-ship shall have the right to declare as prisoners of war all persons belonging to the fighting force of the enemy, as well as the members of the crew, provided the ship has taken an active part in the military operations or has by armed force resisted visit and search.

#### A CAPTURED SHIP TAKEN INTO A PORT OF THE CAPTOR BELLIGERENT

**1905.** When the commander of the war-ship can take his prize to one of the ports of his country or of an allied state, he must do so. On arriving at that port, he must turn over to the superior military authorities a written report relating to the seizure and all

documents under cover and seal, and the military authorities shall keep these documents in order to forward them, as received, to the judicial authorities competent to undertake preliminary examinations in ordinary cases, observing the formalities and principles indicated in the following rule.

**1906.** The maritime authorities of the port into which the prize may have been taken shall be obliged to record in a report all the sealed papers turned over by the war-vessel, ascertaining the exact condition of the seals. They shall, besides, receive the reports made by the commander of the cruiser and by the captain of the prize and the declarations of the members of the crew. They shall take an inventory of the packages deposited, draw up a list of the persons on board, and require that an account of the voyage be made without delay, and they shall prescribe the measures necessary in order to determine the status of the ship and of its cargo and request the delivery of the ship's papers on board the captor vessel.

All these acts and formalities once accomplished, the maritime authorities shall, without delay and within twenty-four hours, deliver the documents relating to the seizure and status of the ship to the judicial authorities competent to undertake preliminary examinations in ordinary cases.

**1907.** Should there be, in the port where the initial proceedings are to take place, a consul of the neutral state to which the prize belongs, he would have the right to assist the naval administrative officer in drawing up the report. In the absence of a consul, the captain of the prize shall have the right to take part in such draft or have himself represented therein and to have the circumstances which he wishes particularly to have noted mentioned in the report.

#### FUNCTION OF THE JUDICIAL AUTHORITIES

**1908.** The judicial authorities competent to make the preliminary examination in ordinary cases shall perform all the subsequent acts which they may deem useful in enlightening the court having jurisdiction in cases of maritime capture and prize. They shall gather all the evidence which they deem capable of facilitating a decision in the case and shall heed the demands of the interested parties which request certain instructions or findings.

1909. The said judicial authorities shall have the right to prescribe urgent measures for the preservation of the captured ship and of all its cargo. They shall have the right to order the restitution to their legitimate owners of all things which cannot rightfully be seized as prize and especially those belonging to the members of the crew or to the passengers who were on board the captured vessel.

1910. On completing the initial examination, the judicial authorities must without delay turn over the whole record to the prize court instituted by their own government for passing in first instance upon the validity of the capture. (Compare rule 1918.)

#### PRIZE TAKEN TO A NEUTRAL PORT

1911. A war-ship shall not have the right to take a prize into a neutral port except in case of *force majeure*, or when it shall have been compelled to take refuge therein, with its prize, owing to the enemy's pursuit.

1912. The maritime authorities of the neutral port and the judicial authorities competent preliminarily to examine ordinary cases must perform all the acts indicated in the foregoing rules and see that the captured ship is kept in custody in the port of refuge, to remain there until such time as the International Prize Court shall decide upon the validity of the capture and of the prize. After judgment, the ship may be placed at the disposal of the owner, if the prize court decides that the capture must be deemed unlawful, or declares the ship and its cargo or a part thereof to be free from seizure.

The same course shall be followed, when the government of the belligerent state in whose name the capture was made and the interested owners of the captured property shall have concluded an amicable arrangement concerning the ship and the cargo.

The purpose of this rule is to protect adequately the rights of sovereignty of a neutral state which has given refuge to a belligerent ship and to its prize. It is inadmissible that a belligerent ship pursued by the enemy may not only obtain shelter in a neutral port, but require from the sovereign of that state the privilege of leaving the port with its prize, when the danger is over. We cannot agree with certain jurists who hold that the neutral government may declare the prize to be free, because that would constitute the neutral a judge in the matter and no such jurisdiction can be admitted. Nor do we believe that it may allow the cruiser to take its prize away, because it

would be furnishing indirect assistance by giving it a refuge to accomplish a belligerent operation, namely, that of placing its prize in safety.

Our rule, as formulated, guarantees all interests and insures the protection of the neutral ship captured until such time as the International Prize Court (rule 1914) shall have passed upon the case, or until such time as the parties shall have concluded an amicable arrangement.

#### THE COMPETENT TRIBUNAL IN CASE OF SEIZURE AND PRIZE

**1913.** The lawfulness and regularity of the seizure of merchant ships in time of war and of the confiscation of these vessels and their cargo must be referred to the judgment of a special tribunal. It shall be its duty to pass upon these matters and render a judgment by which it shall determine the validity and regularity of the seizure, and shall give to the belligerent, in whose name the seizure was made, the right to take possession of the things seized as prize of war, or shall order the belligerent to restore these things to their owners.

**1914.** The special tribunal competent to pass upon the seizure of merchant ships in time of war and upon the validity of prizes shall be constituted as an international court invested with an international jurisdiction.

#### CONSTITUTION OF THE PRIZE COURT

**1915.** The International Prize Court shall be constituted when war breaks out in conformity with the rules to be established in a Congress or in a Conference. It should be composed of five judges, three of them to be designated by the representatives of neutral states and chosen from among the judges of the highest tribunals or admiralty courts of three neutral states, and one designated by each of the belligerents.

**1916.** In the absence of rules established in advance through an international agreement, the court competent to decide finally between the belligerents and the interested parties in the matter of prizes shall always have the special character of an international court and the following rules shall always be observed for its constitution:

Each belligerent shall name one judge; the three others shall be appointed by neutral states, and they shall be selected by lot from among the judges of the supreme or admiralty courts. Each of these states shall have the right to designate three names and the

three candidates who obtain the greatest number of votes shall be deemed elected.

The interested governments shall agree upon designating one of them to count the votes and, in the absence of an agreement, such duty shall be considered as devolving upon the government of one of the states which, according to the "common" law of nations, is bound to absolute neutrality.

The belligerents shall have the right to be represented at the balloting.

**1917.** Should one or both of the belligerent states fail to appoint a judge, the rules established for the appointment of arbitrators whom the parties decline to appoint in case of compulsory arbitration, as provided for in rule 1308, would be followed for his appointment.

#### SPECIAL PRIZE COURT CONSTITUTED BY THE BELLIGERENT

**1918.** Every belligerent state shall have the right to create a special court for the prizes taken by his war-vessels, their function being to decide upon the regularity of the seizures and the validity of the prizes; but he may not ascribe to such court an international jurisdiction in the matter of prize, by conferring upon it the power of pronouncing judgments having final authority with respect to the validity of the seizure and prize, with all the effects arising from the recognition of the prize according to international law.

**1919.** The prize court instituted by each state according to its municipal law shall be considered as a court of first instance with respect to the property seized and subjected to confiscation.

Private persons condemned by the court shall have the right either to accept the judgment or to attack it by appealing to the International Prize Court, alone deemed competent to render final judgment. (*Id.*, 2d and 3d editions, rules 1511-1512.)

The rules here formulated have as their object the removal of the anomaly of the sovereign of a state being at once a judge and a party. The litigation as to the legitimacy of the prize in time of naval war always exists between the government in whose name the capture was made and the owner of the property captured, and as this litigation can only be settled by application of the rules of international law (which determine when a neutral ship or an enemy merchant ship may be seized and when the property seized must be adjudged to the belligerent), it is inadmissible that the sovereign who is a party in the case may himself be the judge. To admit that he may create a

court with final jurisdiction amounts to recognizing in him the faculty of creating an international jurisdiction by virtue of a municipal law,—a possibility contrary to the “common” law of nations. The sovereign may create a special prize commission for the sole purpose of examining the validity of acts performed in his name and interest during war and of deciding whether the commanders of his cruisers have complied with all the conditions required by the laws and customs of war for undertaking the seizure and whether or not it may be declared a valid and rightful prize. This commission should confine its work to enabling the government to control the exercise of the right of prize delegated by the sovereign of the state to the commanders of war vessels and to duly commissioned privateers. But this fact cannot be considered as finally settling the question, exclusively one of international law, as to whether the seizure must be deemed rightful and the prize valid according to the rules of “common” or conventional international law. The belligerent sovereign cannot assume any right to settle that question, because he is a party in the case, either as plaintiff or as defendant as against the owner of the prize, who attacks the seizure as irregular and the prize as unlawful. Accordingly, final judgment in the litigation must be referred to an international court, to be constituted in conformity with the rules adopted in common accord by states or with those established according to the “common” law of nations for the constitution of tribunals of arbitration. We concede that if the belligerent sovereign has instituted a prize court, this jurisdiction may be considered as a court of first instance and that, whatever may have been the decision of that court, if the interested party accepts it, it may become final by the voluntary submission of the losing party. But should the decision not be accepted, it would be wholly impossible to concede that the state, in violation of the rules of “common” law, has the right not only to create such a court but to declare it competent to examine and decide, according to its own laws, questions of international law. (*Id.*, 2d and 3d editions.)

#### COMPETENCE OF THE INTERNATIONAL COURT

**1920.** The international court, constituted in accordance with the foregoing rules to decide upon questions of maritime capture and prizes, shall alone be deemed competent to adjudge finally the cases submitted to its jurisdiction. It shall have the same powers as an appellate court in case each of the belligerent states had, according to rule 1918, instituted a special court in conformity with its municipal law.

**1921.** The international prize court shall sit in the territory of a neutral state.

#### PROCEDURE BEFORE THE PRIZE COURT

**1922.** With respect to the formalities of procedure before the prize court, the rules established for proceedings before tribunals of arbitration shall be observed.

In conformity with these rules, all the preliminary examinations designed to determine the alleged facts and to collect all the evidence which the court may deem necessary in order to decide upon the lawfulness of the prize shall be undertaken. In that respect, both the captor and the prize shall alike be bound to furnish to the court all the evidence which it may request in order to judge intelligently.

1923. Subject to its right to accept or reject any form of evidence, the court must allow both parties to establish the lawfulness or unlawfulness of the seizure and the validity or invalidity of the confiscation.

1924. As to the right of the parties to be represented in the case and to submit complaints and answers, with supporting briefs and arguments; as well as all matters of delays and adjournments, the preliminary examination of the case and organization of the proceedings, the rules of procedure applicable before tribunals of arbitration shall be observed.

#### PROCEEDINGS RELATIVE TO THE LAWFULNESS AND REGULARITY OF THE CAPTURE

1925. It is the office of the prize court to decide whether the seizure of the merchant ship has been effected lawfully and regularly.

1926. The court shall have to determine the lawfulness of the seizure according to the rules of customary or conventional international law in time of war. In order to construe and apply these rules, the court should take into account the state documents which fix their meaning and the principles of conventional law established between the states in dispute. It may also have reference to the decisions of prize courts, which have construed and applied these rules in similar cases, and to the opinion of writers.

1927. The court shall pass upon the admissibility of any particular evidence; it may not, however, reject the documents which were not on board at the time of the seizure and which may exercise a vital influence on the validity of the prize.

It shall evaluate all the evidence and circumstances of fact according to its own convictions and prudent judgment, taking into account the grave necessities of war, which compel the bellig-



erent to look carefully after his own defense and so to exercise all his rights in that respect as to protect his interests most zealously by making a capture whenever he considers himself legally warranted in so doing.

#### WHEN THE CAPTURE OF A SHIP MAY BE CONSIDERED LEGITIMATE

**1928.** The capture of a ship shall be deemed legitimate:

(a) When, the confiscation of enemy merchant ships being admitted (compare rules 1716 *et seq.*), the vessel shall not be able completely to establish its nationality;

(b) When the ship has no papers on board, or when those it has are not quite regular; or when there are reasons for considering them suspicious, e. g., when they have been visibly tampered with, or there is reason to regard them as false or altered;

(c) When the ship, summoned to stop for purposes of visit, has attempted to resist visit and search by force;

(d) When the visit and search have shown in fact that the ship has taken an active part in the hostilities or purposed doing so;

A neutral ship shall always be considered as guilty of this offense when it is chartered by the enemy especially to transport for his account soldiers, provisions or stores intended for troops;

(e) When the ship carries articles of contraband of war and occupies the status contemplated in rule 1872;

(f) When it is employed as a spy, or there is serious reason to suspect it of espionage;

(g) When it has by force undertaken the defense of a hostile ship which was attacked, or has attempted to defend it by taking part in the fight;

(h) When it has been caught in the act of violating a blockade, after it had received a special notification of the blockade.

#### WHEN A CAPTURE IS TO BE CONSIDERED UNLAWFUL

**1929.** A capture shall be considered absolutely unlawful and contrary to customary international law, if the ship, by means of its papers, was able to prove its neutral nationality and the peaceful purpose of its sailing.

The documents to be considered as decisive in that respect are:

- (a) The certificate of nationality;
- (b) Documents relating to the ownership of the ship, when such ownership is not established by the certificate of nationality;
- (c) The charter party, with all the documents relating to the nature and destination of the cargo;
- (d) The muster-roll;
- (e) The ship's papers establishing the route of the ship according to its destination.

These documents if drawn up regularly and without alteration must be regarded as sufficient to establish *prima facie* the legal status of the ship and the destination of the cargo. Whenever the genuineness of these documents is not open to suspicion, they must be recognized as having complete probative force; and any capture made, contrary to their tenor, on the ground of the nationality of the ship or of the nature and destination of the cargo must be considered unlawful.

#### CAPTURE ON ACCOUNT OF CARRIAGE OF CONTRABAND

1930. The capture of contraband of war may be considered rightful only when it consists of articles comprised among those constituting contraband according to the rules of international law and destined for the other belligerent. (See rules 1850 *et seq.*)

1931. The seizure of goods constituting contraband of war which the ship is taking in good faith to a neutral port may be considered lawful whenever the belligerent shall be able to furnish proof that the said goods are to be transhipped in that neutral port to an enemy destination.

But, in that case, it will not be permissible to seize a neutral ship transporting the said goods, unless it shall be established *prima facie* that the ship has committed a hostile act by undertaking voluntarily and knowingly to transport prohibited articles, and has thus placed itself in the position of being considered as a vessel in the service of the enemy. (Compare rule 1873.)

1932. The capture of any ship knowingly transporting contraband intended for the enemy shall be deemed lawful only when such contraband shall, in quantity, constitute a considerable part (three-fourths at least) of the cargo.

When the contraband shall be less in quantity, the belligerent

shall have the right to detain the ship when unable to provide otherwise for the safekeeping of the seizable goods.

[See rule 1873(e), and note thereunder.—Transl.]

**1933.** The capture of a ship transporting contraband of war shall not be considered lawful if the contraband does not constitute the main part of the cargo, and especially if the captain has immediately declared its presence on board.

In such case, only the seizure of the contraband goods is lawful.

#### CAPTURE FOR VIOLATION OF BLOCKADE

**1934.** Capture for violation of blockade shall be deemed lawful whenever a merchant ship, having received special notification of the blockade (see rule 1838), has crossed or attempted to cross the blockade line.

**1935.** Capture for attempted violation of the blockade may also be considered lawful, when undertaken against a ship which has, in bad faith, tried to enter or leave the blockaded port, avoiding, by means of some fraudulent stratagem, the receipt of the special notification, and thus succeeding in escaping the vigilance of the blockading squadron,—provided it cannot prove that it did not know of the existence of the blockade.

**1936.** The capture of a merchant ship shall not be deemed lawful when based solely upon the fact that the ship was chartered for a destination which was a blockaded port or that it was bound for such port. The ship must actually be in a position, at the time of seizure, to be considered guilty of violation or attempted violation of blockade conformably to the foregoing rules.

#### JUDGMENT AS TO CAPTURE

**1937.** After having completed the examination of the case, ascertained the facts and circumstances, and studied the arguments of the parties, the court must determine whether, according to the rules of international law, the capture may be regarded as regular and made in accordance with the formalities required for its legality, reserving its decision on the question of the belligerent's right to confiscate the ship or the cargo, or a portion thereof.

1938. When the ground of the capture is not considered in itself sufficient to legitimate it according to the principles of the "common" law of nations, the court must order the belligerent to restore the property captured, and, taking into account the circumstances which may have brought it about, must determine the responsibility of the belligerent, and, if the case warrants it, condemn him in damages.

If the capture has been made in violation of the rules of international law, or has been proved groundless, the court must condemn the captor not only to restore the ship and its cargo to the owners, but to indemnify the latter for all the damages they may have sustained, and to pay the costs of the proceedings and judgment.

1939. The captor shall likewise be condemned to pay damages, as in the case contemplated in the second part of the preceding rule, when the capture, made for a reason apparently legitimate, shall have been subsequently maintained by reason of some irregularity in procedure chargeable to the commander of the belligerent ship, or by the non-observance of the rules established with respect to the petition for the validation or adjudication of the capture, or when an unjustified delay has occurred, chargeable to the government, in the petition for the validation of the capture. (See rules 1905 *et seq.*)

The three preceding rules aim at distinguishing between the proceedings relating to the regularity of the seizure and the proceedings for the confiscation and condemnation of the property captured. The seizure is always made by the commanders of warships and cruisers, authorized to that effect, under their own responsibility and consequently under the responsibility of the government in whose name the operations of war are being undertaken. It may happen that, while the capture was lawfully and regularly made, the belligerent had no right to confiscate the property seized. Thus, if the seizure had been that of a ship loaded with contraband of war which had been unable, by its papers, to establish satisfactorily that it was bound for a neutral port, it should be considered as accomplished in conformity with the principles of "common" law. If the ship owner, however, could subsequently furnish proof of the peaceful destination of the ship and of the cargo, so as to preclude any right of confiscation in favor of the belligerent as to the ship or cargo, that fact would exclude the right of prize condemnation, but would not change, as regards capture, the relations between the belligerent in whose name the seizure may have been made, and the ship owner and the owners of the goods who may have suffered damage on account of the seizure. The government of the belligerent state in whose name the seizure may have been made would certainly not be civilly liable for these damages. The whole matter reduces itself to examining and deciding whether, considering the circumstances under

which the capture has been made, it had a plausible and justifiable reason. If the court has ascertained the existence of such reason, all responsibility on the part of the government must reasonably be denied, and the responsibility will fall upon the ship owner or the captain towards the owners of the cargo who have suffered damage on account of the seizure. For the captain, in sailing in time of war without having on board absolutely regular papers, has afforded the belligerent a just reason for considering him as an enemy and for seizing the ship and its cargo. In view, also, of the fact that in the proceedings for the validation of the prize, the captured party may be able fully to prove that the ship does not belong to the enemy and has not violated the duties of neutrality, so as absolutely to exclude, on the part of the vessel, any act of hostility likely to cause it to be considered an enemy, that fact would result in denying the right of the belligerent to confiscate the property seized, but could not in any way interfere with his right to make the seizure, since we have supposed that it took place under circumstances when, according to international law, a well-founded and plausible reason for seizure existed. How, then, could there be any responsibility of the government for the damage sustained? Such responsibility could only exist in the second contingency contemplated in our rule, namely, when the seizure, although made for a reason apparently legitimate, may subsequently have been maintained owing to irregularities in the procedure which should have been but was not followed, or owing to an unjustified delay in the closing of the proceedings and in the decision as to the validity of the seizure.

#### JUDGMENT IN THE CASE OF THE DESTRUCTION OF THE CAPTURED SHIP

**1940.** When the commander of the cruiser which has made the seizure is unable to take the prize to a safe anchorage and has therefore sunk it, he is bound as a rule to make compensation for any damage caused and he cannot be exonerated unless the prize court, on the merits of the case, has decided that the belligerent had the right to confiscate the destroyed ship and cargo.

Assuming, however, that the belligerent had the right to confiscate only the ship and a part of the cargo, he should be held liable for all damages caused to the owners of the portion of the cargo with respect to which there was no right of prize condemnation.

#### PROCEEDINGS CONCERNING THE RIGHTFULNESS OF THE PRIZE

**1941.** No belligerent state shall have the right to appropriate a ship or its cargo seized in time of war, unless a judgment of the international court has recognized its right of prize over the ship or the cargo.

## WHEN CAN A SHIP BE CONFISCATED?

**1942.** The right of prize in a ship can only be accorded to a belligerent in the following cases:

1st. If it belongs to the navy or is attached thereto (rules 1628-1629) or if it is a privateer, assuming that privateering is resorted to (see rules 1640, 1642);

2d. If it is the property of private persons, nationals of the enemy state, assuming that the exceptional right of capturing private enemy property contemplated in rules 1716 and following is admitted;

3d. If, being a neutral ship carrying contraband of war, it is subject to the right of prize under the rules hereinbefore laid down (see rules 1872 *et seq.*);

4th. If it is guilty of violating or of an attempt to violate a blockade under the provisions of rule 1848;

5th. If the acts by which it has by force resisted the summons to submit to visit, are such as to cause it to be assimilated to a hostile ship (see rule 1873 *f*);

6th. If it is guilty of participating in acts of hostility committed in the name and in the interest of the enemy (see rule 1872).

## WHEN CAN A SHIP'S CARGO BE CONFISCATED?

**1943.** The belligerent shall have the right of prize over the whole cargo only in case of violation of blockade. In any other case, non-contraband goods on board a ship subject to confiscation must be restored to their owners, but without any obligation of the captor government to indemnify them for damages arising from the seizure.

This rule tends to restrict within just limits the right of prize. Assuming that the ship is engaged in hostile acts and that, by reason of these acts, it becomes an enemy, it does not follow that the owners of the goods who, for commercial purposes, have used the ship for the peaceful carriage of their goods, are to be treated as enemies. It must be said that, even according to the exceptional right which allows the confiscation of enemy merchant ships, it is admitted that the right of prize cannot include neutral goods on board. Therefore, in none of the contingencies in which the ship would become an enemy by the act of the shipowner or of the captain, could the extension of the right of prize to the goods belonging to neutral citizens—which goods by chance are on board such vessel—be justifiable. In case of blockade, it is the destination of the goods for the blockaded port which constitutes the act of

hostility, and it is reasonable then to admit that the belligerent has the right of prize over the ship and the cargo, as he has also undoubtedly the right to appropriate to his own use any arms brought to the enemy to enable him to continue his resistance. Thus, in case of confiscation for carriage of contraband, the right of prize (supposing it applicable not only to the prohibited goods but to the ship as well), could never be extended to include non-contraband goods belonging to peaceful citizens and loaded by them on a ship with a peaceful destination, without indirectly invoking the maxim: *roba del nemico confisca quella del amico*. [The confiscation of the enemy's goods entails that of the friend's goods.]

We have not admitted the state's obligation to pay damages to the owners, to whom the goods must be restored, for the injuries they may have sustained; because, if these owners are entitled to indemnity for the damage suffered on account of the seizure, they must bring their action against the shipowner who has invited the damage by his own act, and not against the government which has exercised a legitimate right in time of war.

#### WHEN MUST THE RIGHT OF PRIZE BE DENIED?

**1944.** The claim of prize over a ship shall not be entertained when the belligerent undertakes to base this right on his own law, and especially on that promulgated at the beginning of the war. The right of prize, indeed, must have as its basis the rules of "common" international law which must govern the rights of the belligerents; otherwise, it could not be considered as lawfully exercised.

**1945.** The right of prize shall never be recognized when a ship has been seized after the term fixed in the preliminaries of peace for the cessation of hostilities, and the ignorance of the captor war-ship that hostilities had ceased does not affect the matter.

**1946.** The capture of a ship seized in neutral territorial waters, although meeting the other conditions required for confiscation according to the "common" law of nations, shall be declared unlawful. If, then, it is proved that the belligerent has made the capture in disregard of the inviolability of neutral territory, the court must declare the prize to be free.

#### NATIONAL SHIPS RETAKEN

**1947.** The right of prize shall not be recognized with regard to any national merchant ship or ship attached to the service of the State during war which, having been taken by the enemy, shall have been retaken before the International Prize Court had adjudged it to the captor as a good prize.

**1948.** Every state must determine by its laws the status of merchant ships taken by the enemy, which are retaken before having been legally adjudged to the first captor.

A reward may be granted to those who shall have retaken the ship, or shall have taken or rescued it after abandonment by the capturing belligerent; but it shall always be considered contrary to customary law to apply to merchant ships seized by the enemy and retaken before having been legally adjudged to him, the same rules as apply to enemy ships in the matter of the right of confiscation and prize in time of war.

#### DECISION OF THE PRIZE COURT AND ITS EXECUTORY FORCE

**1949.** The decision of the prize court shall state the reasons on which it is based, and the facts and the rules of law on which the final judgment or order is founded.

It shall decide as to the lawfulness or unlawfulness of the capture condemn the ship or the cargo or a portion of the cargo as legitimate prize or order the liberation or restitution of free articles to their legitimate owners.

It must, moreover, provide for the payment of damages, when they are legally due, and fix all the expenses of the proceedings and those arising out of the capture and custody of the property seized.

**1950.** The decision shall be final between the parties and deemed effective to determine their respective rights.

**1951.** The parties legally represented in the proceedings or legally in default are bound to consider as final the decision of the prize court, and must execute the decision in all its parts. In case of refusal so to do, the action of the delinquent party shall be deemed in violation of the "common" law of nations and may give rise to all the measures of compulsion established for the purpose of assuring respect for and compliance with international obligations.

**1952.** The states which have signed and ratified or adhered to the XIIth Hague Convention of 1907 must be considered as legally bound to comply, in naval war, with the conventional rules adopted by them with respect to the International Prize Court.

These rules shall, therefore, have binding legal force, subject,



however, to the express condition that the said Convention shall apply as of right only in case the belligerent Powers are all parties to the Convention or have adhered thereto.

With respect to the other States which have not signed and ratified or adhered to the Convention, it must be considered as the most exact expression of the general principles of law.

The Convention which bears the title *Convention relative to the creation of an International Prize Court* is a part of the Hague General Act of October 18, 1907. It was signed on June 30, 1908, by almost all the states represented. On that date it lacked the signatures of Brazil, China, the Dominican Republic, Great Britain, Greece, Japan, Luxemburg, Peru, Portugal, Roumania, and Venezuela.

It was signed subject to a reservation as to article 15 by Chile, Cuba, Ecuador, Guatemala, Haiti, Persia, Salvador, Siam, Turkey and Uruguay.

The text of the Convention follows:

## PART I

### GENERAL PROVISIONS

*Article 1. The validity of the capture of a merchant ship or its cargo is decided before a prize court in accordance with the present Convention when neutral or enemy property is involved.*

*Art. 2. Jurisdiction in matters of prize is exercised in the first instance by the prize courts of the belligerent captor.*

*The judgments of these courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.*

*Art. 3. The judgments of national prize courts may be brought before the International Prize Court:*

*1. When the judgment of the national prize courts affects the property of a neutral Power or individual;*

*2. When the judgment affects enemy property and relates to:*

*(a) Cargo on board a neutral ship;*

*(b) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;*

*(c) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a convention in force between the belligerent Powers or of an enactment issued by the belligerent captor.*

*The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.*

*Art. 4. An appeal may be brought:*

*1. By a neutral Power, if the judgment of the national tribunals injuriously affects its property or the property of its nationals (article 3, no. 1) or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (article 3, no. 2b);*

*2. By a neutral individual, if the judgment of the national court injuriously affects his property (article 3, no. 1) subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place;*

3. *By an individual subject or citizen of an enemy Power, if the judgment of the national court injuriously affects his property in the cases referred to in article 3, no. 2, except that mentioned in paragraph b.*

Art. 5. *An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral states or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal and who have taken part in the proceedings before the national court. Persons so entitled may appeal separately to the extent of their interest.*

*The same rule applies in the case of persons belonging either to neutral states or to the enemy who derive their rights from and are entitled to represent a neutral Power whose property was the subject of the decision.*

Art. 6. *When, in accordance with the above article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.*

*If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.*

Art. 7. *If a question of law to be decided is covered by a treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said treaty.*

*In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists the Court shall give judgment in accordance with the general principles of justice and equity.*

*The above provisions apply equally to questions relating to the order and mode of proof.*

*If, in accordance with Article 3, no. 2, c, the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.*

*The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.*

Art. 8. *If the Court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.*

*If it pronounces the capture to be null, the Court shall order the restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo shall have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.*

*If the national court pronounced the capture to be null, the Court can only be asked to decide as to the damages.*

Art. 9. *The contracting Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.*

## PART II

## CONSTITUTION OF THE INTERNATIONAL PRIZE COURT

*Art. 10. The International Prize Court is composed of judges and deputy judges, who will be appointed by the contracting Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.*

*The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.*

*Art. 11. The judges and deputy judges are appointed for a period of six years, reckoned from the date on which the notification of their appointment is received by the Administrative Council established by the Convention for the pacific settlement of international disputes of the 29th July, 1899. Their appointments can be renewed.*

*Should one of the judges or deputy judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.*

*Art. 12. The judges of the International Prize Court are all equal in rank and have precedence according to the date on which the notification of their appointment was received (article 11, paragraph 1), and if they sit by rota (article 16, paragraph 2), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.*

*The deputy judges when acting are assimilated to the judges. They rank, however, after them.*

*Art. 13. The judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.*

*Before taking their seat, the judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.*

*Art. 14. The Court is composed of fifteen judges; nine judges constitute a quorum.*

*A judge who is absent or prevented from sitting is replaced by the deputy judge.*

*Art. 15. The judges appointed by the following contracting Powers; Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia are always summoned to sit.*

*The judges and deputy judges appointed by the other contracting Powers sit by rota as shown in the table annexed to the present Convention; their duties may be performed successively by the same person. The same judge may be appointed by several of the said Powers.*

*Art. 16. If a belligerent Power has, according to the rota, no judge sitting in the Court, it may ask that the judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judges appointed by the other belligerent.*

*Art. 17. No judge can sit who has been a party, in any way whatever, to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocates for one of the parties.*

*No judge or deputy judge can, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever.*

*Art. 18. The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral Power,*

which is a party to the proceedings or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

Art. 19. The Court elects its president and vice-president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

Art. 20. The judges on the International Prize Court are entitled to traveling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins per diem.

These payments are included in the general expenses of the Court dealt with in Article 47, and are paid through the International Bureau established by the Convention of the 29th July, 1899.

The judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

Art. 21. The seat of the International Prize Court is at The Hague and it cannot, except in the cases of force majeure, be transferred elsewhere without the consent of the belligerents.

Art. 22. The Administrative Council fulfills with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration, but only representatives of contracting Powers will be members of it.

Art. 23. The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The Secretary-General of the International Bureau acts as registrar.

The necessary secretaries to assist the registrar, translators and short-hand writers are appointed and sworn in by the Court.

Art. 24. The Court determines which language it will itself use and what languages may be used before it.

In every case the official language of the national courts which have had cognizance of the case may be used before the Court.

Art. 25. Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel and advocates to defend their rights and interests.

Art. 26. A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a court of appeal or a high court of one of the contracting States, or a lawyer practising before a similar court, or lastly, a professor of law at one of the higher teaching centers of those countries.

Art. 27. For all notices to be served, in particular on the parties, witnesses or experts, the court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

## PART III

## PROCEDURE IN THE INTERNATIONAL PRIZE COURT

*Art. 28. An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.*

*The period within which the appeal must be entered is fixed at 120 days, counting from the day the decision is delivered or notified (article 2, paragraph 2).*

*Art. 29. If the notice of appeal is entered in the national court, this Court, without considering the question whether the appeal was entered in due time, will within seven days transmit the record of the case to the International Bureau.*

*If the notice of appeal is sent to the International Bureau, the Bureau will immediately inform the national court, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.*

*When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.*

*Art. 30. In the case provided for in Article 6, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.*

*Art. 31. If the appellant does not enter his appeal within the period laid down in Articles 28 or 30, it shall be rejected without discussion.*

*Provided that he can show that he was prevented from so doing by force majeure, and that the appeal was entered within sixty days after the circumstances which prevented him entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.*

*Art. 32. If the appeal is entered in time, a certified copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.*

*Art. 33. If, in addition to the parties who are before the Court, there are other parties concerned who are entitled to appeal, or if, in the case referred to in Article 29, paragraph 3, the Government which has received notice of an appeal has not announced its decision, the Court will await before dealing with the case the expiration of the period laid down in Articles 28 or 30.*

*Art. 34. The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.*

*The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.*

*A certified copy of every document produced by one party must be communicated to the other party through the medium of the court.*

*Art. 35. After the close of the pleadings, a public sitting is held on a day fixed by the Court.*

*At this sitting the parties state their view of the case both as to the law and as to the facts.*

*The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on their own initiative, in order that supplementary evidence may be obtained.*

*Art. 36. The International Court may order the supplementary evidence to be taken either in the manner provided by Article 27, or before itself, or one or*

more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

Art. 37. The parties are summoned to take part in all stages of the proceedings and receive certified copies of the minutes.

Art. 38. The discussions are under the control of the president or vice-president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by a belligerent party cannot preside.

Art. 39. The discussions take place in public, subject to the right of a Government which is a party to the case to demand that they be held in private.

Minutes are taken of these discussions and signed by the president and registrar, and these minutes alone have an authentic character.

Art. 40. If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party, and the Court gives judgment in accordance with the material at its disposal.

Art. 41. The Court officially notifies to the parties decrees or decisions made in their absence.

Art. 42. The Court takes into consideration in arriving at its decision all the facts, evidence and oral statements.

Art. 43. The Court considers its decision in private and the proceedings are secret.

All questions are decided by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 12, paragraph 1, is not counted.

Art. 44. The judgment of the Court must give the reasons on which it is based. It contains the names of the judges taking part in it, and also of the assessors, if any; it is signed by the president and registrar.

Art. 45. The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the Court transmits to the national prize court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

Art. 46. Each party pays its own costs. The party against whom the Court decides bears, in addition, the costs of the trial, and also pays 1 per cent of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

Art. 47. The general expenses of the International Prize Court are borne by the contracting Powers in proportion to their share in the composition of the Court as laid down in Article 15 and in the annexed table. The appointment of deputy judges does not involve any contribution.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

*Art. 48. When the Court is not sitting, the duties conferred upon it by Article 32, Article 34, paragraphs 2 and 3, Article 36, paragraph 1, and Article 46, paragraph 3, are discharged by a delegation of three judges appointed by the Court. This delegation decides by a majority of votes.*

*Art. 49. The Court itself draws up its own rules of procedure, which must be communicated to the contracting Powers.*

*It will meet to elaborate these rules within a year of the ratification of the present Convention.*

*Art. 50. The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the contracting Powers, which will consider together as to the measures to be taken.*

## TITLE IV

### FINAL PROVISIONS

*Art. 51. The present Convention does not apply as of right except when the belligerent Powers are all parties to the Convention.*

*It is further fully understood that an appeal to the International Prize Court can only be brought by a contracting Power or the subject or citizen of a contracting Power.*

*In the cases mentioned in Article 5, the appeal is only admitted when both the owner and the person entitled to represent him are equally contracting Powers or the subjects or citizens of contracting Powers.*

N. B. We do not give the subsequent articles (52-57), which refer to the ratification, adhesion and entrance into force of the Convention; its duration, fixed at 12 years from the date of its coming into force, with tacit renewal for periods of six years unless denounced; the method of amendment and other minor provisions.

[An additional protocol was signed at The Hague, September 19, 1910, by the representatives of the United States of America, the Argentine Republic, Austria-Hungary, Chile, Denmark, Germany, Spain, France, Great Britain, Japan, Norway, the Netherlands, and Sweden, among some of whom difficulties of a constitutional nature prevented the acceptance of the Convention of October 18, 1907. The protocol contains the following articles:

*Art. 1. The Powers signatory or adhering to the Hague Convention of October 18, 1907, relative to the establishment of an International Court of Prize, which are prevented by difficulties of a constitutional nature from accepting the said Convention in its present form, have the right to declare in the instrument of ratification or adherence that in prize cases, whereof their national courts have jurisdiction, recourse to the International Court of Prize can only be exercised against them in the form of an action in damages for the injury caused by the capture.*

*Art. 2. In the case of recourse to the International Court of Prize, in the form of an action for damages, Article 8 of the Convention is not applicable; it is not for the Court to pass upon the validity or the nullity of the capture, nor to reserve or affirm the decision of the national tribunals.*

*If the capture is considered illegal, the Court determines the amount of damages to be allowed, if any, to the claimants.*

*Art. 3. The conditions to which recourse to the International Court of Prize is subject by the Convention are applicable to the action in damages.*

*Art. 4. Under reserve of the provisions hereinafter stated the rules of procedure established by the Convention for recourse to the International Court of Prize shall be observed in the action in damages.*

*Art. 5. In derogation of Article 28, paragraph 1, of the Convention, the suit for damages can only be brought before the International Court of Prize by means of a written declaration addressed to the International Bureau of the Permanent Court of Arbitration; the case may even be brought before the Bureau by telegram.*

*Art. 6. In derogation of Article 29 of the Convention the International Bureau shall notify directly, and if possible, by telegram, the Government of the belligerent captor of the declaration of action brought before it.*

*The Government of the belligerent captor, without considering whether the prescribed periods of time have been observed, shall, within seven days of the receipt of the notification, transmit to the International Bureau the case, appending thereto a certified copy of the decision, if any, rendered by the national court.*

*Art. 7. In derogation of Article 45, paragraph 2, of the Convention the Court rendering its decision and notifying it to the parties to the suit shall send directly to the Government of the belligerent captor the record of the case submitted to it, appending thereto a copy of the various intervening decisions as well as a copy of the minutes of the preliminary proceedings.—[Transl.]*



## TITLE XXIII

### THE END OF WAR

#### WHEN IS WAR TO BE CONSIDERED AS ENDED?

**1953.** A war between two or more States can only be considered as legally ended by the conclusion of peace, stipulated in a final treaty of peace.

When the war is waged by a people against a State, or by a faction, under the conditions necessary for belligerency, against the established government, it is ended by the complete submission of the vanquished to the victor.

The last part of this rule finds its application when a people struggles against the constituted power for the purpose of settling by force a question of public internal law. This is what happens, for example, in the case of a war of secession, that is, when a portion of the population of the State undertakes, by force of arms, to constitute a separate and independent State, or when the purpose of the war is to modify the political constitution of the State. In both of these cases, it must be considered as ended when the armed struggle has realized the object contemplated, namely, that of modifying the organization of the public powers or the relations with the sovereign State, those, for instance, of vassal or colony. In none of these contingencies will a treaty of peace be necessary; the war will be considered as ended by the realization of the accomplished and definitive fact. We say definitive, having in mind the rules concerning civil war (rules 124 *et seq.*) and recognition (rules 167 *et seq.*).

#### PRELIMINARIES OF PEACE

**1954.** War may not be considered as ended by the mere cessation of hostilities; in such a case the rules governing suspension of arms or armistice shall be applied.

**1955.** Military occupation, although extended over a considerable period of time and rendered stable by the constitution of a government, cannot have the effect of causing the war to be considered as legally at an end, as a result of the tacit relinquishment of the territory occupied; but a formal treaty shall always be required, which shall recognize the new state of affairs, and thus war be declared at an end.

**1956.** The preliminaries of peace duly concluded have not the effect of legally putting an end to the war; they have merely the legal value of a provisional treaty of peace stipulated by the belligerent parties with the object of concluding peace forthwith upon the bases agreed upon between them through the preliminaries of peace, the details of which are to be stated with precision only in the final treaty.

The preliminaries of peace ought not, therefore, to be regarded as mere preparatory agreements, as compacts *de contrahendo*, but as acts acknowledging a provisional international obligation of peace. We use the term provisional, not in the sense that the agreement may be considered as a convention of general armistice preparatory to negotiating peace, but in the sense that the parties, who cannot immediately agree on the detailed terms of peace, fix the essential conditions of such peace, and reserve their right to negotiate forthwith and with reciprocal fairness the details relating to minor points, in order to bring to realization the principal points already agreed upon in the preliminary treaty.

#### THE TREATY OF PEACE

**1957.** Those deemed capable of stipulating the conditions of peace shall be the persons who are actually in possession of the sovereign authority and to whom the government of the State is intrusted.

When the national party, which represents the majority of the citizens, has established a provisional government in place of the legitimate sovereign who is vanquished and a prisoner, or has abdicated, or is for any reason whatever actually prevented from exercising his sovereign powers, the persons who fulfill the functions of the sovereign and in fact constitute the government must be deemed capable of consenting to the conditions of peace.

**1958.** The treaty of peace shall be deemed valid when it fulfills the conditions required for the validity of any other treaty. (See rules 747 *et seq.*, 757-758.)

**1959.** It is the victor's privilege to condition the conclusion of peace upon such terms as he deems most likely to satisfy his legitimate rights.

When, however, the conditions forced by the victor upon the vanquished, and which the latter cannot refuse to discuss, are so severe as to entail the economic, political, or moral ruin of the vanquished state, it may be a ground for convoking the Conference, to which the conditions of peace are submitted. The collective intervention of the states must, indeed, in that case be

admitted for the purpose of determining the conditions of peace which are best adapted to the principles of international justice,—principles that the victor cannot with impunity violate to the detriment of the vanquished. (See rules 559, 788, 1212g, 1240g and h.)

**1960.** The forced cession of a portion of the territory of the vanquished state may be imposed as a condition of peace, but it cannot be deemed valid unless stipulated in a treaty of peace properly concluded in conformity with the rules which must govern the cession of territory between states.

#### RATIFICATION OF THE TREATY OF PEACE

**1961.** When, under the provisions of constitutional law, peace can only be concluded on condition that the treaty be ratified by the legislative bodies, the war must be considered at an end by the stipulation of the treaty of peace, but subject to the condition subsequent of ratification. The agreement must, however, be regarded as effective and cannot be considered as broken unless the legislative assemblies have expressly refused to ratify the treaty.

**1962.** As soon as the decision not to ratify the treaty has been finally reached, the law of war shall once more be in full force and hostile acts may again be undertaken without reservation or condition.

**1963.** In no case can there be any interference with the right of a party concerned in the case to bring about the meeting of a Conference and to submit the treaty of peace to that assembly in order to have it revoked or modified, when the conditions imposed by the victor may be considered as too detrimental to the legitimate rights of the vanquished state or contrary to the general principles of international law.

#### METHOD OF EXECUTING THE TREATY

**1964.** The provisions of the treaty of peace, until revoked, must be executed with integrity and good faith and deemed binding upon the state which has accepted them, even where they were imposed by the victor through preponderance of his military force,

their effect being to modify the respective historical conditions of the two adversaries and the rights previously acquired by each of them. (Compare rule 757.)

#### GENERAL EFFECTS OF THE TREATY OF PEACE

**1965.** The general effect of the conclusion of peace is a renunciation on the part of the two belligerent states of any action relating to the facts which brought about the war and of all differences which gave rise thereto, it being admitted that everything is finally settled by the treaty of peace.

**1966.** The treaty of peace, according to "common" law, produces certain general effects, which are:

(a) The absolute cessation of every act of hostility from the day of its signature and ratification, and the nullity of any act of warfare accomplished in ignorance of the conclusion of peace;

(b) The release of prisoners of war;

(c) The re-establishment in force of the treaties previously concluded between the two states and suspended on account of the war;

(d) General amnesty;

(e) The restoration of the exercise of the rights of sovereignty suspended during the war;

(f) The recognition of actual possessions at the time of the conclusion of peace, when not otherwise provided in the treaty itself.

**1967.** It is incumbent upon the parties to determine in the treaty of peace with clearness and precision the effects of the cessation of the war; carefully to avoid surprises; to eliminate ambiguities with the greatest attention; not to leave unprovided any matter likely to give rise to discussion; and to avoid subtleties which may bring about misunderstandings and differences of interpretation.

#### CESSATION OF HOSTILITIES

**1968.** The parties must state in the preliminaries of peace the day on which hostilities must cease during the time necessary for the ratification of the treaty as concluded and signed, or stipulate a general armistice until the treaty is ratified.

In the absence of all agreement in the matter, acts of hostility can only be considered unlawful from the time peace must be deemed to be finally concluded by the ratification of the treaty of peace *stipulated*.

During the Russo-Japanese war, hostilities continued while the treaty of peace signed on September 5, 1905, was being ratified; they stopped effectively only on the 16th of the same month by virtue of the armistice convention concluded September 14th.

#### PRISONERS OF WAR

**1969.** Prisoners of war are entitled to be set free on the conclusion of peace, unless they have been found guilty of offenses committed during their captivity. They must not be detained to answer for other previous offenses.

#### TREATIES SUSPENDED DURING WAR

**1970.** Once peace is concluded, all the treaties between the two states which are compatible with the new state of affairs created by the treaty of peace (unless, however, it provides otherwise), re-enter into force. (Compare rules 845 and 859.)

#### AMNESTY

**1971.** When provided for in a general way in the treaty of peace, amnesty must embrace in principle all offenses of a political character committed during the war by the belligerents themselves or by persons belonging to the respective military forces.

Under this head must come all offenses committed in violation of the laws and customs of war, which must be deemed blotted out by amnesty, and persons convicted must be released on the conclusion of peace.

Amnesty cannot as a rule cover "common" law offenses committed during war by individuals, who are amenable to the ordinary courts and punishable by "common" law.

## RE-ESTABLISHMENT OF THE EXERCISE OF THE RIGHTS OF SOVEREIGNTY

1972. Peace once concluded, the respective states must be deemed *ipso jure* reinstated in the free exercise of all their rights over all parts of the territory of their states recovered by them under the treaty of peace, and over all persons under their jurisdiction, subject to the conditions named in the treaty.

1973. If the rule of the *statu quo ante bellum* has been stipulated in the treaty of peace, it must be so construed and applied as not to conflict with the rights acquired by individuals during the war, and, saving an express declaration to the contrary, the following rules must be observed.

1974. The sovereign reinstated in the possession of his territory will have the right to restore everything to its previous condition in so far as public administration is concerned; but he must take into account the legal consequences arising from the military occupation of the territories restored to him.

He cannot exercise his sovereign rights retroactively, but will have to respect all acts accomplished under the laws and customs of war and all rights acquired by individuals during the occupation, whether derived from contracts legally concluded or from judgments pronounced during the occupation and considered final. (Compare rules 1542, 1561, 1567.)

1975. The said sovereign must take into account the laws and regulations proclaimed by the enemy authorities and the legal consequences arising therefrom during the interregnum.

He will have the right to subject to the authority of his own laws and regulations (which re-enter into force *ipso jure ipsoque facto*) any act, right, or expectation, from the time he has been reinstated; but he must respect already perfected rights acquired by individuals during the hostile military occupation.

1976. The reinstated sovereign shall be considered as restored at once to the possession of his rights of territorial sovereignty even with respect to the enemy who has militarily occupied the recovered territory.

Accordingly, the political laws and public law of the State shall recover their full authority and the promulgation of the treaty which restores the *status quo ante bellum* will authorize the sover-

eign to repeal all modifications introduced into the said laws and into public law during the military occupation, saving the respect due to vested rights acquired by third parties.

1977. Property must be restored to the condition existing when the enemy took possession of it, subject to the reservation of changes and damage which have been the natural consequence of the acts or operations of war.

It may be said, in application of this rule, that a stronghold, for instance, must be restored to its condition before capture, provided that it was still in the same condition at the time of the conclusion of peace. Supposing that it had been disarmed and dismantled during the war, and that no provision concerning it was contained in the treaty of peace, the party to whom the fortress ought to be restored could not claim that the other party should be bound to undertake the necessary work for replacing that fortress in the *statu quo ante bellum*. That party could only be so bound if he had disarmed and dismantled the fortress subsequently to the conclusion of peace.

#### RULES RESPECTING THE PRESENT STATE OF POSSESSION

1978. If, in the treaty of peace, the clause *uti possidetis* has been incorporated, it would apply to the property belonging to the two belligerent states, the possession of which they may have acquired in consequence of the events of war. But, even in that case, the rights of ownership of individuals, who, deprived of their property during the war, might be entitled to indemnity, must be reserved.

The expression *uti possidetis*, accepted to indicate the confirmation of the present state of possession, must be understood as signifying that, under that clause, all the property which one or the other party has taken possession of during the war must remain in its status of ownership as of the time of the conclusion of peace. Therefore, under the said clause, the personal property of the enemy state (such as cannon, arms, ammunition, money, horses, means of transport) taken by the adversary during the invasion of the enemy territory, as also the proceeds of personal property collected by him, must remain in the hands of the present possessor. It must also be admitted, under the same clause, that when nothing to the contrary has been stipulated in the treaty of peace, certain portions of the conquered territory must be considered as transferred to the possessor, whose conquest must thus be regarded as legitimated. (Compare Oppenheim, *op. cit.*, v. 2, § 273.)

1979. The parties who, by adopting the *uti possidetis* clause in the treaty of peace, have thus intended to renounce the exercise of all rights in consequence of the events and changes which occurred during the war, will have to determine their respective obligations as regards any rights of individuals to demand in-

demnities for the damage they may have sustained in the course of the hostilities. That the action may be instituted by individuals under the law before the ordinary judicial courts, or may only be brought before administrative bodies does not matter.

In the absence of an express provision on the subject, the principles of the "common" law of nations concerning the respective obligations of governments in case of succession between states shall, by analogy, apply.

#### WAR DAMAGES

**1980.** The belligerents concluding a treaty of peace are bound to determine without ambiguity who shall be responsible for the indemnities due to individuals who have suffered damage during the war. It is, indeed, equitable to indemnify these individuals as far as possible, even when in strict law they have no legal remedy.

**1981.** Any property damage suffered by individuals during war, when it is established that it is actually a result of military operations, gives rise to the right of obtaining compensation for the injury sustained, either through judicial or administrative channels.

This rule is based on the principle that war is a relation between State and State and that the ensemble of the acts accomplished in the course of hostilities must be considered as having had the purpose of protecting the rights and interests of the community. Therefore, citizens must be held responsible for all the consequences of war *uti universitas*, and as such are bound to bear all the consequences of it; but they cannot be considered as bound to such obligation *uti singuli*. Consequently, those who have suffered a property damage owing to acts of warfare should not be bound to bear it individually, as if it were a damage arising from a case of *force majeure* or from an unexpected event. On the contrary, the damage must be charged to the community, because the object of war is always the respect of the rights of the community which are defended by force of arms against a foreign state seeking to violate them. It is, therefore, in accordance with natural principles of justice and equity always to admit the right of action of an injured individual, so that the damages individually suffered by him through acts of warfare may be distributed equally among all the members of the community. Such damages must, indeed, be borne by the citizens *uti universitas* and not by the individuals who have sustained them *uti singuli*.

But, in order to obtain reparation for the damage will it always be possible to appeal through judicial or administrative channels? This is, in our opinion, the only really disputable question for the solution of which it will be necessary to refer to the following rules.

**1982.** Individuals may resort to judicial remedies in order to



obtain reparation for the damage caused during the war, whenever they have been deprived of their property under circumstances not involving the immediate urgent necessities of war, although motivated by the preventive measures and needs of defense of the State.

The right and legal remedy of the injured party in such case for the reparation of the injury sustained must be governed by the principles applicable to damages suffered by individuals on the ground of public utility (eminent domain) and must be exercised in conformity with these principles.

This rule is applicable in any case of expropriation or damage suffered by individuals during war or because of it, which is not the consequence of actual belligerent operations; that is, of the struggle between adverse military forces at the time hostile action is carried on through attack and defense, but which is brought about by the exigencies of war and the preventive requirements of defense. Such, for instance, would be the furnishing of foodstuffs and articles required by the military commanders for the supply of the army and navy, the expropriation of means of transportation or of ships for the needs of war, or the deterioration or expropriation of property owing to the preventive requirements of defense. There is no doubt, in our opinion, that the injured or expropriated party who suffers damage for the advantage of the belligerents must be compensated therefor. He must, therefore, be entitled to bring an action against the State, which is bound to compensate him for the damage under the terms of the treaty of peace or in conformity with the general principles of law.

**1983.** The destruction or injury of the property of individuals during war, in execution of a plan of attack or defense, when carried out in a place where at the time no battle was in progress (that is, at a time when no military action was taking place), and undertaken as a preventive measure of defense, cannot be considered as an *act of war* accomplished as an unavoidable necessity or as *force majeure*. They must be regarded as events brought about by the necessities of the defense and in the public interest of the belligerent, and consequently the injured party cannot be denied the right to be compensated for the damage suffered, through recourse to a legal action against the State responsible for the destruction or injury either under the general principles of law, or under the provisions of the treaty of peace.

**1984.** Any damage suffered by individuals during battle and arising from the actual military operations of attack and defense cannot be considered as a war damage giving a right to reparation or compensation.

Anything that a belligerent deems it urgent to do or undertake in the places where he meets the enemy, and where the struggle is actually going on, must be considered as an "act of war" and the damage arising therefrom to individuals must be deemed the result of unavoidable necessity or *force majeure*.

The injured party may only be allowed, with a view to being indemnified, an administrative action based on the principles of equity.

The distinction made in the rules proposed may serve not only to determine the nature and character of the right acquired by individuals for obtaining the reparation of their damage, but to establish which of the belligerents is bound to make such reparation, when no special provisions on the subject have been incorporated in the treaty of peace.

In our opinion, an act of war has the character of an act of necessity and of *force majeure*. But not everything that may be brought about by the necessities of war can have the character of an act of necessity and of *force majeure*. When, in effect, the damage was inflicted, not in the course of battle but at some other time for the purposes of military defense, it cannot be deemed an unavoidable consequence of *force majeure* and of an *act of war*.

It is undeniable that in such case the injuries to property are the consequence of public necessities, and that the right cannot be denied to the sovereign, who must ensure the defense of the State, and to the belligerent, who must see to the success of the war, of authorizing the said injuries with the fullest authority. It must be borne in mind, however, that while that which is done on account of public necessities and interest always bears the character of a legitimate act and consequently must take precedence over private interests, yet the sovereign who, in the interest of the nation, has ordered measures prejudicial to private property must indemnify the owners so injured. Accordingly, the reparation of the damage must be governed by the rules applicable in case of expropriation on the ground of public utility rather than by those applicable to damage caused by acts of war.

See the notes and references on this topic in the last chapter of our *Trattato di Diritto pubblico internazionale*, v. 3, § 1842, and our note under the judgment of the Court of Appeal of Lucca of March 8, 1880, in *Journal du droit international privé*, 1883, p. 78.

[The rules above mentioned follow closely the principles laid down by the French *Conseil d'Etat*. On the subject of war damages from the point of view of municipal law and international law, see Borchard, *The diplomatic protection of citizens abroad*, Pt. I, ch. VI, pp. 246-280.—Transl.]

#### IMMEDIATE EFFECT OF PEACE

**1985.** A treaty of peace duly concluded and legally ratified shall have the general and immediate effect of ending *ipso jure ipsoque facto* the application of the laws of war, with all the effects arising therefrom while it is in force, and to make the international law of peace once more exclusively applicable.

## CONCLUSION

### OF THE SECOND AND THIRD ITALIAN EDITIONS

The rules that we have formulated as a code are not, to be sure, those at present governing all the international relations of civilized peoples; nor can it be foreseen when governments will be able to agree upon proclaiming a body of rules constituting their "common" law, and thus give a legal organization to the *de facto* society existing among them. In proposing these rules, we have not thought of claiming that international law may at once be codified, and of solving by codification the very delicate problem of endowing with a legal basis the society of states, and much less have we entertained the foolhardy pretension of legislating. Our sole purpose has been to demonstrate that the legal organization of the society of states could be secured by establishing between them a "common" law to govern all the relations arising out of their association, and that it would be possible to find the means of assuring respect for that law and to punish violations thereof. We have endeavored to indicate a course to be followed, with full confidence that others will be able to improve upon our work, filling out the gaps, and laying down more satisfactory rules.

The codification of international law cannot be the work of one person or of a small number of persons. It will be the final outcome of the laborious efforts of a great many scientists and the latest expression of the legal convictions which, with the progress of civilization, will gradually be formed in the conscience of civilized peoples and will undoubtedly modify the function of diplomacy and of the most liberal governments.

The ultimate result will only be reached in a more or less remote future. Difficulties will be the more easy to overcome as the process will be gradual, beginning with the codification of those parts of international law concerning which common legal convictions have already been formed and which refer to matters respecting which the social conditions in the different countries are

most uniform. In the meantime, every one should, according to his own forces, by writing, teaching, discussion and any other useful means, contribute to the progressive formation of uniform legal convictions concerning the fundamental principles which must prevail in the harmonious organization of the society of civilized states, so as to evolve and elaborate little by little a system corresponding to the actual present needs of the different states.

We have endeavored, as a willing contributor, to bring our grain of sand to the construction of this great edifice, and we have deemed it expedient to set forth the result of our studies on the different branches of international law by means of rules grouped in the form of a code. Our sole aim, as we stated in our introduction,<sup>1</sup> has been to condense our scientific views, expressing them as distinct propositions arranged in a systematic order, so as to set them out, as far as possible, with the greatest clearness and precision. If we have not succeeded in our task, we have at least made all possible efforts in that direction.

In order to give the international society an organization conforming to the needs of modern times and to proclaim a body of rules having the authority of law for all states, the initiative of the most liberal governments will be necessary, and there is no doubt in our mind that it will manifest itself.

THE PRIMITIVE LEGAL SOCIETY WAS THE FAMILY; THE LEGAL CONFEDERATION OF CIVILIZED PEOPLES WILL BE THE LAST AND HIGHEST MANIFESTATION OF LAW.

## CONCLUSION OF THE FOURTH EDITION

It is some few years since we published in Italy the third edition of the present work. It was printed in 1900 and, as stated in our preface, was the exact reproduction of our second edition which was issued in 1898, since the printing of the codified rules was made with the plates of the second stereotyped edition. No one could foresee that diplomacy would bring about a Conference for the purpose of providing for the legal organization of the international society through the codification of conventional rules intended to insure peace. Yet this is what happened on the initiative of the Czar,

<sup>1</sup> See our *Introduction*, § 25.

who, in 1898, proposed the meeting of the *First Peace Conference*, which began the work of codification by formulating the conventional rules established in common agreement in the final Act of The Hague of July 29, 1899.

This first Conference was the most important event of our time. It established the important precedent of the meeting of states in a Congress, without distinction as to greater and lesser Powers, for the purpose of codifying rules with a view to the pacific settlement of international disputes by arbitration; of introducing into war on land and on sea somewhat greater moderation and humanity; of proclaiming the principles of right and justice in certain matters of general interest; and of reducing as much as possible the excessive expenditures for armaments.

The states there assembled, which were signatories of the Final Act, were only 27 in number. It cannot be said, to be sure, that the conventions they concluded fulfilled the great hopes to which the convocation of the Conference had given rise. It even appeared as if that attempt was somewhat derisive, since it was followed within a short time by the Boer war (October 10, 1899) and by the China war (1900).

The program, however, remained as it had been announced, that of attempting to codify the rules designated to assure the peace of mankind. This program was adopted by all the peace societies, which deplored the pre-eminence of force in the international society, and especially by the Interparliamentary Union, which has labored and will continue to labor for the cause of humanity and civilization. Meeting at St. Louis on the occasion of the Universal Exposition, that Union stimulated anew the movement for the program which had brought about the First Hague Conference and expressed to the President of the United States the wish to bring about the meeting of a second Conference for developing and completing the work of the first. This wish, communicated to President Roosevelt on September 24, 1904, resulted in the circular of the Department of State of Washington of the 21st of October of that year for the meeting of a new Conference. The proposal was accepted in principle as a consequence of negotiations between the states signatory of the general act of 1899, and the Second Hague Conference assembled on June 15, 1907. Public opinion, as a result of the disappointment of the first Con-

ference, was very skeptical of the work of the second. This conference, however, was convened and the number of states which took part in it increased materially, reaching a total of 44.

Those who have a one-sided view of things insist in claiming that the second Conference has likewise fallen short of its expectations; that the conventions concluded have merely resulted in regulating war rather than in strengthening peace; that naval and military expenditures, instead of decreasing, are everywhere increasing; that the Russo-Japanese war and the danger of a war more terrible, averted by the Algeciras Conference, constitute the most convincing proof that the efforts of the Peace Conference have been of no avail. As for us, leaving aside all subtle consideration of the question, but viewing it on its merits, we find that the result of the Conference corroborates the opinion we had expressed in the month of October, 1898,<sup>1</sup> on the occasion of the note of the Czar of August 12/24 of that year, that the meeting of the Hague Conference is the greatest event of our time and that the results arrived at, while incomplete, cannot be considered as negligible or as falling short of expectations, since the program, which remains the same, has as its object the codification, by common agreement, of conventional rules for assuring the legal organization of international society.

Prior to these two Conferences, states had adopted universal rules of conventional law for the organization of certain services of an industrial or economic character, such as the postal, telegraph, and international railroad services. They had likewise concluded certain treaties of a political character to regulate their reciprocal interests, or to provide for a new order of things resulting from war, or to settle certain differences of interests so as to prevent hostilities. Nevertheless, these treaties are but empirical compacts based upon reciprocal convenience, and have been concluded only between states which desired to protect their present interests. But the world has seen a congress of 44 states assembled to lay down in common agreement universal rules of conventional law of a political character governing their reciprocal obligations and rights and to establish, in accord, judicial means designed to insure respect for and compliance with the said rules.

<sup>1</sup> See *Opinion de M. Pasquale Fiore: La question de désarmement et la note du Tsar Nicolas II*, in *Revue générale de droit international public*, v. 5, 1898, p. 732.

Matters must not be viewed with distrust, nor must one consider whether the results are entirely complete, or entirely satisfactory. It is the constitution of the Hague assembly, its characteristic aspect and its mission which, in our opinion, constitute the most important, striking, and significant event. If its results are at present incomplete, they will, nevertheless, by reason of the progress of civilization and under the influence of public opinion, which will always induce governments to modify the direction of politics to conform with the joint interests of nations, become in a more or less remote future complete and satisfactory. A fact which cannot be denied is that the assembly of The Hague represents the natural legal organ of the international society for proclaiming the law of the *Magna civitas* as a binding legal force for all the states represented therein, with the obvious character of equality and mutuality, by placing the rules codified in common accord under the collective legal protection of the states thus associated. It follows therefore clearly, that, its mission being better determined, that assembly will succeed in a more or less proximate future, in solving the problem of the legal organization of the international society through the gradual codification of the rules designed to govern that society, and the organization of authorities most likely to guarantee the respect of these rules.

Is not the periodicity of the Peace Conferences, voted unanimously by the 44 states, a fact of a capital importance?

For the Conference of 1907 voted the meeting of a Third Peace Conference within a period of time similar to that which elapsed between the first and the second, and in addition the creation of a committee to prepare in advance a program and determine further matters susceptible of international regulation.

If we have not as yet attained a satisfactory result, we are, nevertheless, on the high road to it.

As for us, we declare that we never lost our faith in the triumph of ideas. Ideas, not facts, dominate the world. At present our faith is strengthened by the fact that the ideas which had inspired our doctrine are gradually being realized.

We beg leave to reproduce what we wrote in 1879:

"If the condition of the working class is not to grow worse, it is necessary to moderate the increasing preponderance of militarism.

"Now, it is apparent to our mind that this will be arrived at only

when the industrial and manufacturing *bourgeoisie* and the other classes, which need peace to prosper, shall acquire a greater power and influence in the government of public affairs.

"We have seen in our time the most obstinate sovereigns, who styled themselves kings by divine right, yielding before the irresistible power of ideas and accepting the crown from the hands of the people; and so will follow obstinate diplomacy." <sup>1</sup>

In 1887, speaking of the difficulties of solving the problem of the legal organization of the *Magna civitas*, we wrote: "As to the practical solution of the problem, our faith in the future increases all the more as we see the excess of militarism growing and the social question becoming more acute. Both that question and those excesses, while having distinct objects, will bring about the same result: that of hastening the solution of the international problem." <sup>2</sup>

To conclude, we witness the triumph of progressive codification. Diplomacy has recognized the necessity of bringing the question upon the tapis. One thing leads to another: we have made a good beginning and we are fairly convinced that step by step the international society will be given its legal organization and a structure adapted to the needs of civilization.

THE PRIMITIVE JURIDICAL SOCIETY WAS THE FAMILY; THE FINAL SOCIETY WILL BE THE JURIDICAL UNION OF CIVILIZED PEOPLES.

<sup>1</sup> Fiore, *Trattato di diritto internazionale pubblico*., 2d ed., 1879 (Turin, Unione Tipografico-Editrice), § 133, p. 108.

<sup>2</sup> *Id.*, *idem*, 3d ed. (Turin, *id.*, 1887), § 133, p. 93. See also: Fiore, *Un appel à la presse et à la diplomatie. L'empereur d'Allemagne. La question européenne. Une solution*. Paris, Chevalier-Marescq, 1890.



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